

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
ERIE DIVISION

- - -

RONALD FLEMING, : CIVIL ACTION
Plaintiff, : NO. 02-164 Erie

-VS- :

SUPERINTENDENT WOLFE, et al, :
Defendants. :

- - -

Pretrial conference proceedings held before the
Honorable Magistrate Susan Paradise Baxter, on Monday, October
17, 2005, held in the Judge's Conference Room of the United
States Federal Courthouse, 617 State Street, Erie,
Pennsylvania, 16501, commencing at 9:35 a.m. and concluding at
4:05 p.m.

- - -

For the Plaintiff:

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REPORTED BY: DENICE A. GRILL, RMR
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1 P R O C E E D I N G S

2 JUDGE BAXTER: Before we get started on the
3 pretrial conference, I wanted to -- First, let me call the
4 case. This is Ronald Fleming versus Superintendent Wolfe, et
5 al., civil action number 02-164 Erie. We're here for a
6 pretrial conference.

7 Several housekeeping things I want to talk about first.
8 Obviously, we set this up in our minds with a jury trial. We
9 missed that there had not been a jury demand, and so therefore
10 this afternoon was set aside as voir dire. We don't need
11 that. Have you had -- You have planned to have your
12 defendants here tomorrow?

13 MR. MERICLI: Yes.

14 JUDGE BAXTER: So we wouldn't start this
15 afternoon. I was going to say, was there a chance we could
16 start this afternoon, but it would be dependent on the
17 defendants.

18 MR. MERICLI: Yes.

19 JUDGE BAXTER: Okay, we'll start tomorrow.

20 MR. MERICLI: Very good.

21 JUDGE BAXTER: Another thing I want to ask is if
22 you two have talked about settlement outside of my earshot.
23 Whenever we've been on the phone together --

24 MR. MERICLI: No, your Honor.

25 MR. FLEMING: Huh-uh.

1 JUDGE BAXTER: I have to tread lightly on that,
2 Mr. Fleming, because it's a Judge trial, so I can't --
3 Sometimes in a jury trial the Judge assists a pro se person a
4 little bit. I can't do it at all. I have to stay totally
5 impartial on that.

6 MR. FLEMING: All right.

7 JUDGE BAXTER: So I'm not going to bring it up
8 again. If you want to talk to Mr. Mericli in that regard,
9 you'll have to do that on break this afternoon.

10 MR. FLEMING: Yeah.

11 JUDGE BAXTER: I'm not going to have anything to
12 do with it, okay. I know you might bring it up -- I know you
13 might say something like Judge, I think. . . I'm out of that
14 at this point.

15 MR. MERICLI: I think I can simplify matters by
16 saying my clients are not interested in settling the case.

17 JUDGE BAXTER: Okay, that's on the record.

18 MR. MERICLI: Okay.

19 JUDGE BAXTER: All right. Now, the first thing I
20 think we should talk about before we go down the list of
21 pretrial matters is Friday -- we always get those last minute
22 letters -- we received a letter from you that was filed,
23 saying that you hadn't gotten two tapes that you had described
24 in a letter. Are we anywhere on that? What's going on about
25 that?

1 MR. MERICLI: Let me explain. At this point I
2 sent the tapes and I have -- If you'll excuse me, your Honor.

3 JUDGE BAXTER: Sure.

4 MR. FLEMING: You said you sent them certified
5 mail, right?

6 MR. MERICLI: Yes.

7 MR. FLEMING: On when? October the what?

8 MR. MERICLI: I sent them on -- I had sent them
9 certified mail on --

10 JUDGE BAXTER: Does the --

11 MR. MERICLI: Here they are, October the 4th.
12 Now, I have --

13 JUDGE BAXTER: You can take a look at this
14 (indicating), Mr. Fleming.

15 MR. MERICLI: I have my secretary calling the post
16 office to find out why there was no return receipt signed for
17 this.

18 MR. FLEMING: Okay. Where is the --

19 JUDGE BAXTER: This address?

20 MR. FLEMING: Why ain't all that filled out?

21 MR. MERICLI: Because it hasn't been -- As you can
22 see, on September 28th -- I think it was the 28th, where I
23 actually got a green card back, that's not filled out, but
24 that's what you get.

25 MR. FLEMING: What's this (indicating)? This is

1 something else.

2 MR. MERICLI: That's something else.

3 MR. FLEMING: This ain't the tapes, is it?

4 MR. MERICLI: This is what we don't have in this
5 instance.

6 MR. FLEMING: Let's go back to the one, please.

7 You said you sent the tape by certified mail?

8 MR. MERICLI: I sent it by the same thing.

9 MR. FLEMING: This is suppose to be filled out.

10 MR. MERICLI: Well, it's not filled out on the
11 other one either.

12 JUDGE BAXTER: That's what he was trying to point
13 out, the other one made it and he hadn't filled that out
14 either, but this one we don't have a return receipt. And I
15 don't believe this is anything you fill out anyway.

16 MR. FLEMING: I never received no tapes.

17 MR. MERICLI: I have my --

18 MR. FLEMING: And also --

19 MR. MERICLI: And I left my secretary with a FAX
20 and I have her because --

21 JUDGE BAXTER: These have never been returned, so
22 you haven't --

23 MR. MERICLI: They were never returned. But I do
24 have copies of the tapes here that I can make an exhibit. An
25 Exhibit "A" and "B" for me, but I can make them Court's

1 exhibits and he can watch them here --

2 JUDGE BAXTER: Okay. And he can watch them this
3 afternoon.

4 MR. MERICLI: -- Before we proceed further.

5 JUDGE BAXTER: Were you planning on using them as
6 Defendants Exhibits?

7 MR. MERICLI: But I can make them Court exhibits.

8 MR. FLEMING: I need my own copies though. I'd
9 rather have my own copies.

10 MR. MERICLI: There's another point
11 I'd like to make, if it's all right?

12 JUDGE BAXTER: Let him talk.

13 MR. MERICLI: I'd like to argue in the strongest
14 possible terms that there are strong and compelling legal
15 arguments for why there should not be a trial in this case.

16 JUDGE BAXTER: All right.

17 MR. MERICLI: If you know -- If we can dispose of
18 that at the outset, it certainly would be of some importance.

19 JUDGE BAXTER: At the outset, yes.

20 MR. FLEMING: I'll get a chance?

21 JUDGE BAXTER: You'll get a chance to oppose that,
22 yes, of course. But we got this letter from you on Friday and
23 so I wanted to talk about this.

24 MR. FLEMING: All right.

25 JUDGE BAXTER: And from your letter -- I did not

1 know whether they had been sent. Now I see that he says that
2 they have been sent, but you say they have not been received.

3 MR. MERICLI: I didn't have staff over the
4 weekend, so I left photocopies of the letter and I left a
5 message. I'm hopeful that my secretary didn't take today off.

6 JUDGE BAXTER: And she'll look into it?

7 MR. MERICLI: And she'll look into it. But if
8 not, if I could make a call I could have the paralegal, who
9 I've already spoken to this morning about another matter, I
10 could have her look into it.

11 JUDGE BAXTER: We will do that in a bit, but since
12 he has an argument to make about trial, let's do that. I do
13 want to say that this case is just so old and that's why I
14 pushed it fast here at this point. In a case that was filed
15 in '02 it's very unusual to be doing a motion to dismiss, you
16 know, R and R --

17 MR. FLEMING: It's like the fourth or fifth one.

18 JUDGE BAXTER: -- Three years later. And we did
19 that this spring.

20 MR. FLEMING: It's the same arguments, he --

21 JUDGE BAXTER: But you have more and more amended
22 complaints, so that makes for more motions to dismiss.

23 MR. MERICLI: I had filed a motion to dismiss to
24 the initial complaint, and then the Court decided that it was
25 appropriate to respond to all four complaints.

1 JUDGE BAXTER: Al together.

2 MR. MERICLI: I did ask for an additional 30 days
3 to do that, but ultimately we did --

4 MR. FLEMING: Was that all --

5 JUDGE BAXTER: But my point is it's an old case
6 but it hasn't been worked for three years solidly. I mean we
7 lost you for a while. We didn't hear from you, and then we
8 found you again. So, because of that the argument you're
9 about to make is pertinent, is what I'm trying to say.

10 MR. MERICLI: I see.

11 JUDGE BAXTER: I'm not about to say this is too
12 late to make an argument, because it's a three year old case.
13 Even though it is a three year old case -- Do you understand
14 what I'm saying?

15 MR. MERICLI: Yes.

16 MR. FLEMING: You're saying it's pertinent, that
17 it's okay for him to make the argument?

18 JUDGE BAXTER: Yes, I'm allowing him to make the
19 argument.

20 MR. FLEMING: He's making an argument not to
21 go to trial?

22 JUDGE BAXTER: I don't know what it's going to be,
23 I haven't heard it.

24 MR. FLEMING: When is the appropriate time?

25 JUDGE BAXTER: Now.

1 MR. FLEMING: Okay.

2 JUDGE BAXTER: Let him make his statement. Don't
3 interrupt him and I'll let you talk.

4 MR. FLEMING: One more thing I just want to say,
5 the videos that -- of incidents that is in regards to this
6 suit, he said that they said they don't even have and these
7 are like my key videos that I need.

8 JUDGE BAXTER: But if they don't have them,
9 there's nothing we can do about that, Mr. Fleming.

10 MR. FLEMING: What I'm saying is, I was on camera.
11 Under the policy, any time I come out of my cell, it must be
12 recorded.

13 JUDGE BAXTER: Well, then you can ask those
14 questions to the defendants when they're on the stand.

15 MR. FLEMING: All right.

16 JUDGE BAXTER: You can call them and asked why you
17 weren't being recorded.

18 MR. FLEMING: All right.

19 MR. MERICLI: First, I'd like to say that these
20 arguments are not distinctively different from the arguments
21 that I made in the brief in support of judgment under Federal
22 Rule of Civil Procedure 50, that's dated October 12th.

23 JUDGE BAXTER: Do I have that? Yes, I have that.

24 MR. MERICLI: I think so. So to that extent I
25 would think that proper notice of them has been given.

1 JUDGE BAXTER: All right.

2 MR. MERICLI: And I'm not attempting in any way to
3 sandbag Mr. Fleming.

4 JUDGE BAXTER: Do you have that document? It
5 looks like this (indicating)?

6 MR. FLEMING: Yeah.

7 JUDGE BAXTER: All right.

8 MR. MERICLI: So, there are two sets of claims in
9 this case. One set deals with excessive force allegations,
10 the other set deals with retaliatory conduct allegations.

11 JUDGE BAXTER: This one (indicating). Do you see
12 that?

13 MR. FLEMING: What date is that?

14 MR. MERICLI: October the 12th.

15 MR. FLEMING: I ain't never got it --

16 MR. MERICLI: It's not distinctively different
17 from the summary judgment motion.

18 MR. FLEMING: See, he says there's a lot of things
19 that he sent that I never got.

20 JUDGE BAXTER: Is this not your address
21 (indicating)? And that shouldn't say --

22 MR. FLEMING: That's my address right there
23 (indicating).

24 JUDGE BAXTER: This is your address?

25 MR. FLEMING: Yeah. When did he send it?

1 JUDGE BAXTER: The Court filed it. It was filed
2 on October 12th.

3 MR. FLEMING: October 12th?

4 JUDGE BAXTER: And he sent it to this address.

5 MR. FLEMING: I never got that. Okay.

6 MR. MERICLI: Well, it isn't a lot different from
7 things I sent before. And you just said earlier this morning
8 that I've been saying the same things over and over again.

9

10 JUDGE BAXTER: We'll let him talk.

11 MR. MERICLI: Maybe if you'll bear with me you'll
12 hear it maybe for the last time. In any case, we have those
13 two sets of allegations. The one is the excessive force and
14 the other is the retaliatory conduct. Now --

15 JUDGE BAXTER: Let me interrupt by saying, Mr.
16 Fleming, the retaliatory conduct we had recommended continue.
17 The excessive force we had recommended in May, as you recall,
18 that should be dismissed. The District Judge disagreed and
19 kept that count in. So there are two counts remaining.

20 MR. FLEMING: One? What about --

21 JUDGE BAXTER: The first one is retaliation, based
22 on the misconducts.

23 MR. FLEMING: Right.

24 JUDGE BAXTER: And the second one is injuries by
25 your allegation, the wicker was shut down on your wrist.

1 MR. FLEMING: Right.

2 JUDGE BAXTER: So we know where we're going.

3 MR. FLEMING: What did you say the date was,
4 October --

5 JUDGE BAXTER: October 12th.

6 MR. FLEMING: October 12th.

7 JUDGE BAXTER: The two questions that we're going
8 forward --

9 MR. FLEMING: He just said that --

10 JUDGE BAXTER: The two questions that are going
11 forward on you've known about all summer. What I'm saying is,
12 those are the two issues that he's addressing in this brief.
13 And he's making an argument on the law that you've seen
14 before, and he's making it again, all right.

15 MR. MERICLI: Okay.

16 JUDGE BAXTER: He just said he filed it on the
17 12th. That was last Wednesday.

18 MR. MERICLI: Okay.

19 MR. FLEMING: I came down here on Friday so --

20 JUDGE BAXTER: So you may not have received it.

21 MR. FLEMING: I ain't never get it.

22 JUDGE BAXTER: All right.

23 MR. MERICLI: Well in any case, they're similar,
24 including some of the citations to the motion for summary
25 judgment that was dismissed without prejudice. So, I'm just

1 trying to make a point that Mr. Fleming has at some point seen
2 the arguments I'm going to make.

3 Now, what I'd like to begin by saying is --

4 JUDGE BAXTER: You don't have to dance around, you
5 disagree that I needed the support that I was claiming I
6 needed under 56. You don't have to dance around that. You
7 can disagree with me on that, if that's your point.

8 MR. MERICLI: No, no, no, that's not my point.

9 JUDGE BAXTER: All right.

10 MR. MERICLI: Just bear with me for a second.

11 JUDGE BAXTER: All right.

12 MR. MERICLI: Because there's been a lot of
13 interchanges.

14 JUDGE BAXTER: Yes.

15 MR. MERICLI: And I'm just trying to collect my
16 thoughts. I apologize.

17 JUDGE BAXTER: That's all right. I didn't want
18 you to be concerned about my feelings on that at all. Go
19 ahead.

20 MR. MERICLI: No, in fact, in relation to that
21 I've put that aside.

22 JUDGE BAXTER: Okay.

23 MR. MERICLI: I'm not attempting to dispute it in
24 anyway.

25 JUDGE BAXTER: Okay.

1 MR. MERICLI: If you would prefer to consider this
2 in the nature of a --

3 JUDGE BAXTER: Rule 50 --

4 MR. MERICLI: -- That would be more appropriate at
5 this point. And Rule 50 can be made at any point.

6 Now, here's what happened. Mr. Fleming says he was
7 kicked in the ankle. We say he faked a stumble and faked a
8 trip. There is a verified tape of this incident. We have
9 interrogatories from the security, Captain Weaver, that
10 validates it as appropriate.

11 Now, let's assume Teller did kick him in the ankle, all
12 right. He also says that when they finally got to the
13 library, the slot in the door, which for some unknown reason
14 is called a wicker, was slammed down on his wrist. So now we
15 have him --

16 JUDGE BAXTER: The ankle --

17 MR. MERICLI: The ankle and the wrist. He's
18 clipped on the wrist and kicked in the ankle.

19 MR. FLEMING: Videotape --

20 MR. MERICLI: And the videotape ends before the
21 allegations of the wicker, all right, and there are reasons
22 for that, which are matters of fact.

23 MR. FLEMING: That's main security.

24 MR. MERICLI: If you'll just let me speak.

25 JUDGE BAXTER: He has the floor.

1 MR. FLEMING: All right.

2 MR. MERICLI: Now the next time happens on August
3 23rd, he says Davison hit him on the right elbow with the
4 gate. We say he was in a truculent and foul mood and kicked
5 the gate shut, and actually hit Davison. The tape shows what
6 it shows.

7 Now, back to my legal argument. The Court is aware of
8 the fact that the Third Circuit, unique among the circuit
9 court of appeals, has decided that de minimus injuries do not
10 invalidate an excessive force claim.

11 JUDGE BAXTER: That's correct.

12 MR. MERICLI: I believe that the injuries in this
13 case are definitely de minimus injuries even as represented by
14 Mr. Fleming. In other words, for the sake of argument I've
15 conceded Teller kicked him in the ankle and Sullivan slammed
16 his wrist --

17 JUDGE BAXTER: For the sake of argument.

18 MR. MERICLI: For the sake of argument.

19 JUDGE BAXTER: He's not conceding it. I
20 understand.

21 MR. MERICLI: I'll concede that Sullivan slammed
22 his wrist and that Davison hit him with this hurricane fence
23 gate.

24 JUDGE BAXTER: And under the circuit you have to
25 tell me now that it wasn't in a --

1 MR. MERICLI: Malicious manner.

2 JUDGE BAXTER: That's right.

3 MR. MERICLI: But in good order.

4 JUDGE BAXTER: Right.

5 MR. MERICLI: Except we have an excellent opinion
6 dated December 4th, 2004 by Judge Hochberg of the District
7 Court of New Jersey. Now, what she attempts to do is grapple
8 with Brooks -v- Kyler in the context of a case as we have
9 today.

10 In view of the fact that in Hudson versus McMillian the
11 United States Supreme Court said, citing to Johnson versus
12 Glick, a Second Circuit Court of Appeals opinion, that not
13 every push or shove is a violation of the
14 Eighth Amendment, and that de minimus force is not a violation
15 of the Eighth Amendment.

16 What Judge Hochberg says is I think we can reconcile
17 Hudson -v- McMillian and Johnson -v- Glick with Brooks -v-
18 Kyler. What was alleged in Brooks -v- Kyler? Now there was
19 de minimus injuries, but Brooks said he was beaten within an
20 inch of his life while he was handcuffed by a gang of sadistic
21 guards. That is the sort of thing -- And even Hudson versus
22 McMillian talk about when people are tortured so as to leave
23 no marks or apparent injury. Obviously, it would be --

24 JUDGE BAXTER: There's no way to be beaten and not
25 have some marks.

1 MR. MERICLI: But obviously it would be a poor
2 Eighth Amendment that allowed people to be tortured as long as
3 it left no marks. But on the other hand, it's not respecting
4 the Eighth Amendment to say every time somebody gets bumped or
5 pushed they've been cruelly and unusually punished.

6 So what she says is you have to have two things. You
7 have to have injury more than de minimus, and you have to have
8 allegations that it happened in a sadistic, brutal, vicious
9 way to somebody who was, you know, basically at their mercy.
10 And it's not in this case. In Thompson, the guy had a cut on
11 his bridge of his nose, swollen area on the right cheek bone,
12 he was treated with antibiotics and given an ice pack. And
13 Judge Hochberg granted summary judgment because it just
14 happened in a quick flurry.

15 They, just like a couple of primates or a couple of
16 cats, they just tore up at each other, and that is not the
17 Eighth Amendment. Now, I think our case is even less. We
18 have -- Let us say we have, you know, a guard who just gives
19 him a swift kick in the ankle, another one who is dismissive
20 and slams a cell slot, another one who slams a gate too fast.
21 That's not the Eighth Amendment. That's Johnson versus Glick
22 and Hudson versus McMillian, de minimus uses of force. The de
23 minimus uses of force.

24 The de minimus injuries aren't what support my argument
25 for ruling as a matter of law, it's the de minimus use of

1 force and the de minimus injuries, and that's all I have to
2 say about that.

3 JUDGE BAXTER: All right, I understand what you're
4 saying.

5 MR. MERICLI: I have a copy of --

6 JUDGE BAXTER: I do need a copy of it. I've
7 always read Brooks to say that we can't say as a matter of
8 course that a de minimus physical outward noticed injury in
9 itself can always mean that an Eighth Amendment violation
10 hasn't occurred. So we're not going to go that far and say
11 that.

12 However, I don't think it says it never means that. I
13 think what they said is there will be times when maybe
14 evidence can be shown that there's not a big outward injury
15 but there has been some sort of out to get the prisoner going
16 on and they've been clever about it. And so we don't want to
17 foreclose those just because we don't see a broken arm or a
18 fat lip. So, I've never taken Brooks -v- Kyler to be that
19 strong.

20 Obviously, I recommended dismissing the count earlier,
21 but it will be interesting for me to read how Judge Hochberg
22 reconciles this.

23 MR. FLEMING: Can I say something?

24 JUDGE BAXTER: Sure --

25 MR. MERICLI: If you want, I could then address

1 the retaliatory misconducts.

2 JUDGE BAXTER: Let's talk about this first, and
3 then you can present the motion on the retaliation.

4 MR. FLEMING: I want to say that, okay, now for a
5 officer to kick and slam a wicker on my wrist, as it was
6 stated, that it's not enough to state a Eighth Amendment
7 claim, but due to the fact that I may file grievances saying
8 that I need medical attention and I can establish that also it
9 was a violation under Farmer versus Brennan, because it took
10 them a long period of time to even see if I was injured for
11 what happened to me.

12 JUDGE BAXTER: So you're arguing that the outward
13 injury would have been greater if they had looked at it first?
14 Is that what you're saying, it was a greater injury than
15 they're arguing?

16 MR. FLEMING: No, what I'm saying is that under
17 Farmer versus Brennan, which is deliberate indifference, which
18 is they knew that I had made a claim that I had been assaulted
19 through excessive force, but still refused to check and see if
20 my claims was legitimate --

21 MR. MERICLI: That claim --

22 JUDGE BAXTER: That's not in front of us. We have
23 very specific claims going to trial. You can't be a moving
24 target for him. He has to know what he's defending today.
25 And the claim that they took too long, that there was

1 deliberate indifference is not part of the trial. The trial
2 is excessive force under the Eighth Amendment for this wicker,
3 whatever the thing is called.

4 MR. FLEMING: Okay, wicker.

5 JUDGE BAXTER: Wicker. And secondly, that they
6 retaliated against you by giving you as you allege frivolous
7 misconducts because you complained.

8 MR. FLEMING: Okay. I would like to say now that
9 I'm on the right course, that I would like to make it a issue
10 that during all of these claims, which is stated by
11 their attorney under the law, the prison also has a policy
12 where whenever I come out my cell that I must be on video
13 camera.

14 And I'd like to raise a issue that one of the claims
15 that I made, the video was never working at the time where I
16 said that I was assaulted, if I can bring that up now.

17 JUDGE BAXTER: Well, that is an issue. You say we
18 have the extraction where he claims he was kicked on video?

19 MR. MERICLI: Yes, and we also have the medical
20 checkup that took place right after that.

21 JUDGE BAXTER: On video?

22 MR. MERICLI: Yes.

23 JUDGE BAXTER: What we don't have is the --

24 MR. FLEMING: Wicker slamming.

25 MR. MERICLI: Right now I have my witness who says

1 -- And this is just an offer of proof. My witness says that
2 once he gets inside the law library there's no point to
3 continue the camera, that's why --

4 JUDGE BAXTER: That's where the wicker is?

5 MR. MERICLI: The wicker is after he's inside he
6 has to stick his hands out to get the handcuffs off.

7 MR. FLEMING: This is my turn, right?

8 JUDGE BAXTER: Yes, go ahead.

9 MR. FLEMING: I'd like to say, any time you were
10 in the RHU, which is the Restricted Housing Unit, it's
11 security issues. Not only is it a security issue for being
12 confined there, but especially when I'm on a camera and for --

13 JUDGE BAXTER: Is there a camera when you're
14 inside --

15 MR. FLEMING: Yes, it is.

16 JUDGE BAXTER: -- The place --

17 MR. FLEMING: Yes, there's two cameras. As soon
18 as you get inside the law library they have two cameras
19 pointing straight down. Even if that tape somehow stopped, it
20 still should be seen by the two cameras inside the library.

21 MR. MERICLI: One more offer of proof. Weaver
22 says that he doesn't understand what he's talking about with
23 the two cameras inside the library, that's just what he says.

24 JUDGE BAXTER: He doesn't say there is two
25 cameras.

1 MR. FLEMING: I can establish that it is. But
2 what I wanted to say was for --

3 JUDGE BAXTER: Through testimony, through
4 questioning him?

5 MR. FLEMING: Through cross, direct, I'll find a
6 way.

7 JUDGE BAXTER: That's how you're going to --

8 MR. FLEMING: I'll find a way. God willing, he
9 will give me a way. What I'm saying, for him to say it's not
10 really of a concern for the camera to be working at the time
11 of handcuffs being taken off of me, it's a security issue.
12 Why would he cut the camera off when they got to take
13 handcuffs off? I could see they cut it off when I get in my
14 cell, but keep in mind the wicker is open and my hands is out
15 -- my one hand is out and my other hand is still in the cuff.
16 Why would they turn it off when the cuffs are still not
17 removed?

18 JUDGE BAXTER: What about the fact when he says
19 there are no cameras going when you get into that spot of the
20 library?

21 MR. FLEMING: Is two cameras into there. Is two
22 cameras inside that law library.

23 JUDGE BAXTER: They aren't running.

24 MR. FLEMING: I don't know why he said that. They
25 also have an overhead camera of anybody that come out their

1 cell. I don't know why he said that don't work at the time or
2 whatever. I could establish that under the prison security
3 policy that both cameras in the library are there, and that
4 the overhead camera is there, too, but they said that, you
5 know, they don't have none.

6 MR. MERICLI: I'd like some rebuttal --

7 JUDGE BAXTER: I want to ask him a few more
8 questions first. Talk to me about the injury that occurred
9 there.

10 MR. FLEMING: In the law library?

11 JUDGE BAXTER: The one that hasn't been on tape,
12 one that isn't on tape.

13 MR. FLEMING: Well, when I got inside the law
14 library, you know, you got your hands cuffed behind your back.
15 What they do is they tell to you back up and they open the
16 wicker and you stick your hand through the wicker. So I stuck
17 my hands through. They took my right hand off first and then
18 I turned for them to take my left hand. And I clearly seen
19 it, CO Sullivan was working the camera.

20 And right as he -- Right as I got my wrist out ready
21 for the other one to come out, he took his foot and held up on
22 the wicker, and he held my hand trapped in the wicker. And
23 I'm trying to pull my arm out as he's doing it. And I
24 remembered that he said, oh, the camera's not working. That's
25 how I know that they was not going to have that incident. And

1 I wrote it in my grievance.

2 I said in my grievance that I can show you right now,
3 right before they was taking my hands out the wicker the
4 camera will not show it.

5 JUDGE BAXTER: You're also going to testify what
6 will happen next? What will your testimony be what happened
7 next?

8 MR. FLEMING: After they got me in the library?

9 JUDGE BAXTER: After it hit your one wrist.

10 MR. FLEMING: After it hit my wrist --

11 JUDGE BAXTER: You tried to push it out. Then did
12 they lift it?

13 MR. FLEMING: Hold on. It was slammed. He
14 slammed it in my wrist and they held my arm. When he held it
15 like this (indicating), I was like four other officers held my
16 arm and pulled it out like this (indicating) and took -- and
17 took the cuff off.

18 And I took my hand out and Sergeant Eddy was standing
19 right there on the side of the window and I showed him my
20 wrist. I said, man -- I said, man, look at this. 'Cause it
21 was like -- 'Cause it was down like this (indicating) and I
22 had some blood dripping off of it. Not a
23 lot of blood it was just a little bit where you could see
24 where you slammed my wrist. And he just turned around and
25 just walked away.

1 And that's when Tiller, the one that kicked me in my
2 wrist, came back and looked in the window. And he said -- He
3 said -- He said I spit on the window directly in front of him.
4 Okay, now at this time I'm frustrated and trying to tell them,
5 look, give me some medical attention. And they, you know, and
6 they walk away.

7 So, -- So what happened is, next thing I know they come
8 back to my -- back to the library with this spit mask saying
9 put this on you, put this on. I'm like, man, I ain't putting
10 that on, I didn't do nothing. They like, look, you don't put
11 it on, you know what's going on. And there was too many of
12 them there. I ain't going to be no fool.

13 JUDGE BAXTER: All right, I get an idea of what's
14 going on. Go ahead.

15 MR. MERICLI: First, I think for the purposes of
16 --

17 JUDGE BAXTER: Rule 50, we don't need to get into
18 the factual.

19 MR. MERICLI: I also think in light of Rule 50 and
20 Judge Hochberg's opinion I think you should look at these
21 tapes to see in fact the end, the level of injury and the
22 level of force as alleged could not rise to the level of an
23 Eighth Amendment.

24 JUDGE BAXTER: Okay.

25 MR. MERICLI: I think that whatever this man would

1 have -- I think it's too small. It's below the radar, even if
2 we give him his allegations. That's why I'd like to put them
3 with the Court --

4 MR. FLEMING: Can I --

5 JUDGE BAXTER: You'll get to see them.

6 MR. MERICLI: Yes.

7 MR. FLEMING: What I want to say is, it's still
8 like two more tapes that they said they don't even got. The
9 one where -- where they said that I broke a cuff key which is
10 also one of the four claims that you dismissed, you said --

11 MR. MERICLI: That's retaliatory misconduct, that
12 has nothing to do --

13 JUDGE BAXTER: That has nothing to do with it,
14 that is the kick in the shins and the handcuffs.

15 MR. MERICLI: These are the two tapes
16 (indicating).

17 MR. FLEMING: What about the medical treatment?

18 MR. MERICLI: It's there.

19 MR. FLEMING: Showing they took me inside the
20 medical room. He didn't even check me. All he did was check
21 my heartbeat and put his hand on my back or something and
22 said, no, ain't nothing wrong with you, your blood is not --

23 JUDGE BAXTER: That's on there. We'll take a
24 look. You'll get to see it, too.

25 MR. FLEMING: All right.

1 MR. MERICLI: Okay.

2 JUDGE BAXTER: Now the retaliation claim.

3 MR. MERICLI: The retaliation claim. Now in terms
4 of the retaliation claim, I referred the Court earlier and I
5 referred Mr. Fleming earlier to Carter versus McGrady.
6 There's no doubt that none of these misconducts were
7 overturned. None of them were ever overturned.

8 What Miss Wallen is waiting for right now is some final
9 information from Camp Hill, because as Mr. Fleming was moved
10 through the system until his successful release, his records
11 were moved with him. So they're not really here at Albion in
12 terms of his personal records.

13 I mean they may have records on investigations and
14 things like they did that pertain to them, like Captain
15 Weaver's own records, but they don't have the whole history of
16 the misconducts. When I tried to get the misconducts -- I
17 have them and I have an affidavit from Valerie Bloom, the
18 records technician at Camp Hill, she gave me all the
19 misconducts all the hearings and all the sanctions, but she
20 gave me no indication of the appellate resolution or if there
21 was any appellate resolution of all of them.

22 JUDGE BAXTER: Okay.

23 MR. MERICLI: So that's what should be being
24 FAX'ed to us today.

25 JUDGE BAXTER: Is it your argument that without

1 testimony of the defendant saying we would have done this
2 anyway, that simply showing that none of the misconducts were
3 overturned is enough legally?

4 MR. MERICLI: That's right.

5 JUDGE BAXTER: Is that your -- Do you understand
6 what I said, Mr. Fleming?

7 MR. FLEMING: Excuse me?

8 MR. MERICLI: This is an opinion from Judge
9 Circone that just came down as you see September 15th.

10 JUDGE BAXTER: Okay.

11 MR. MERICLI: Where Judge Circone took my argument
12 there.

13 JUDGE BAXTER: And agreed.

14 MR. MERICLI: And agreed.

15 JUDGE BAXTER: That's enough under the
16 retaliation?

17 MR. MERICLI: Yes. Yes, so that would finish
18 everything. On top of it, the second set of arguments --
19 That's the simple approach to it.

20 JUDGE BAXTER: Yes.

21 MR. MERICLI: The other argument is -- And I have
22 to apologize to the Court for this, and that is I was laboring
23 under a misapprehension that because Mr. Fleming has achieved
24 his freedom, that -- and is a citizen now, that he was not --
25 that all the issues of whether or not he exhausted remedies

1 were -- or whether or not he procedurally defaulted was moot.
2 It's not moot.

3 MR. FLEMING: Never --

4 MR. MERICLI: And under --

5 JUDGE BAXTER: That's right.

6 MR. MERICLI: Under two cases that --

7 JUDGE BAXTER: But I can't look into that myself,
8 I need to you tell me whether that's been done.

9 MR. FLEMING: He never --

10 MR. MERICLI: Right, in terms of --

11 JUDGE BAXTER: You can argue in a second.

12 MR. MERICLI: Abdul Akbar versus McKelvie and
13 Ahmed versus Dragovich. And they make it clear, while the
14 action was clear while an individual was incarcerated that
15 procedural default and exhaustion apply fully.

16 JUDGE BAXTER: All right.

17 MR. MERICLI: Now at this point I can and will
18 make an argument under the third prong of Rauser that -- And
19 under these cases that he procedurally defaulted definitely on
20 the Camp Hill misconduct involving Kreider, Wittel and Allen.

21 JUDGE BAXTER: How did he do that?

22 MR. MERICLI: He did that because -- If you'll
23 excuse me, he did that because the materials that I was given
24 on Allen --

25 MR. FLEMING: That's a sworn affidavit, right?

1 JUDGE BAXTER: Let him finish.

2 MR. MERICLI: The materials I was given on Allen
3 -- And you have a copy of this.

4 MR. FLEMING: Was this the first or the second?

5 MR. MERICLI: First. The materials I was given on
6 Allen -- I can mark this as "C".

7 JUDGE BAXTER: I'll just take a look at it for now
8 and give it back to you.

9 MR. MERICLI: If you can see here and look at the
10 back, unlike the Albion misconduct when I asked them for their
11 own misconduct, they gave me the entire packet including the
12 appeals.

13 JUDGE BAXTER: Okay.

14 MR. MERICLI: And you can see that here it's quite
15 clear in the letter and subsequently in the attached --

16 JUDGE BAXTER: No appeals were received?

17 MR. MERICLI: No appeals were received. So I'm
18 particularly interested in this one because I have three men
19 coming from Camp Hill, traveling six hours starting at two
20 o'clock.

21 JUDGE BAXTER: Today?

22 MR. MERICLI: Yes. So without needing to go as
23 far as the argument I made successfully to Judge Circone, in
24 this case we have a very clear instance where he procedurally
25 defaulted.

1 JUDGE BAXTER: How many are there? It's three?

2 MR. MERICLI: There's, in addition to this one --

3 CLERK: Six --

4 MR. MERICLI: In terms of -- If I may interrupt,
5 Frank, in terms of defendants that are involved in this case,
6 here's how I have it worked out. He -- There's a misconduct
7 where Tiller claims at Albion on May 14th that Mr. Fleming
8 threatened him with bodily harm and used abusive, obscene or
9 inappropriate language. That's the spitting incident.

10 JUDGE BAXTER: Okay.

11 MR. MERICLI: Then there's also a misconduct that
12 I think is related, filed by Weaver. Even though Weaver is
13 not a defendant.

14 MR. FLEMING: Weaver's a defendant. He is a
15 defendant.

16 MR. MERICLI: He's not a defendant anymore. That
17 is called lying to an employee. And the one there was whether
18 or not his entire account of the transport to the law library
19 with the kick and the wicker was a cock and bull story.

20 JUDGE BAXTER: Okay.

21 MR. MERICLI: And they've convicted him of that.
22 Then we move down to I believe -- I believe that was on May
23 20th of '02.

24 JUDGE BAXTER: That's what we have.

25 MR. MERICLI: Then we move down to Davison and

1 Maldonado, destroying, altering or tampering with state
2 property. That was the cuff key.

3 MR. FLEMING: That was not videotaped. Why wasn't
4 it?

5 MR. MERICLI: That's the broken cuff key.

6 JUDGE BAXTER: Okay, got it.

7 MR. MERICLI: The next one is 8-23-02, that's
8 Davi son and Maldonado saying, no, they didn't -- Davi son
9 didn't hit him with the gate, he kicked the gate at Davi son.

10 JUDGE BAXTER: We have two in between that.

11 MR. MERICLI: Those two are in fact -- One of them
12 -- They involve non-defendants, and that's why I don't have
13 them.

14 JUDGE BAXTER: I see.

15 MR. MERICLI: One of them -- But I have them
16 charted out for us. They are -- There's one on --

17 JUDGE BAXTER: 8-2.

18 MR. MERICLI: There's one on the -- the 8-2 one
19 does involve Davi son and Maldonado. There's one on 7-30-02
20 that's a Sergeant Yurko. There's one on 5-30-02, that's
21 Corrections Officer Wernicki .

22 JUDGE BAXTER: Okay.

23 MR. MERICLI: One on 8-12-02 that's Vroman.

24 JUDGE BAXTER: I don't have that.

25 MR. MERICLI: And that involves --

1 JUDGE BAXTER: 8-2 is part of it?

2 MR. MERICLI: Yes, 8-2 is part of it. Then
3 there's one on 8-18 that involves Correction Officer Morales.

4 JUDGE BAXTER: He's not a defendant.

5 MR. MERICLI: No. So those are the ones that were
6 left in the report and Vroman and Wernicki, Yurko, Morales
7 drop out and leave us with the ones I went through.

8 JUDGE BAXTER: Okay.

9 MR. MERICLI: There's also a final misconduct that
10 Robison filed for lying to an employee about the 8-23
11 incident, but I don't have any -- any indication it was ever
12 resolved. And what happened is on September 11th he was moved
13 to SMU at Greene. So perhaps they just let the whole thing
14 go.

15 JUDGE BAXTER: Okay, so we have -- Let me make
16 sure I have them. You said 5-14 we have 19 -- Is it 14?

17 MR. MERICLI: It's 14. The number, that's an
18 mischievous error that I think Mr. Fleming made.

19 JUDGE BAXTER: We have 5-20, 8-2. Is -- 5-30 is
20 out?

21 MR. MERICLI: 5-30 is out.

22 JUDGE BAXTER: So 8-2.

23 MR. MERICLI: Yes.

24 JUDGE BAXTER: 8-18.

25 MR. MERICLI: No, I think 8-18 is out.

1 JUDGE BAXTER: And 8-23 is out because we don't
2 have a resolution on that.

3 MR. MERICLI: 8-23 --

4 JUDGE BAXTER: Is in.

5 MR. MERICLI: Is in. There's an 8-23 that's in.
6 That's the one of Davison and Maldonado. So if I can go back.
7 5-14-02 Tiller, 8-2 Davison and Maldonado, and 8-23 Davison
8 and Maldonado.

9 JUDGE BAXTER: What about 5-20?

10 MR. MERICLI: That's Weaver.

11 JUDGE BAXTER: He's out?

12 MR. MERICLI: He's not a defendant, but it relates
13 to --

14 MR. FLEMING: He is a defendant, isn't it? Yeah,
15 Weaver is a defendant.

16 MR. MERICLI: Is he?

17 MR. FLEMING: Yes, he is. He's been a defendant
18 all during the course.

19 JUDGE BAXTER: But was he dismissed, that was the
20 issue?

21 MR. FLEMING: No. As a matter of fact, I just got
22 an interrogatory of productions from him.

23 MR. MERICLI: If he's not, he's a defendant.

24 JUDGE BAXTER: He's on here, but has he been
25 dismissed?

1 MR. FLEMING: No, he hasn't.

2 JUDGE BAXTER: He hasn't been listed as
3 terminated.

4 MR. FLEMING: He's not terminated. He was the
5 main -- He was the investigating captain that investigated the
6 whole incident. Out of four misconducts that you said we'll
7 proceed, his was the first one for retaliation claim.

8 JUDGE BAXTER: I have him. I don't have him
9 terminated.

10 MR. FLEMING: Right, he's not terminated. And I
11 also wanted to say, okay, he said I never appealed the
12 misconduct from CO --

13 MR. MERICLI: He still is a defendant, I'm sorry.

14 JUDGE BAXTER: He's still part of your --

15 MR. MERICLI: I made a mistake. That means the
16 5-30 --

17 JUDGE BAXTER: Okay, 5-30.

18 MR. FLEMING: See, the misconduct he gave me, and
19 he is correct that I appealed it. Now I never received
20 anything.

21 JUDGE BAXTER: Hold on. Before you get that far,
22 we have 5-14, 5-20, which is Weaver.

23 MR. MERICLI: Right, I'm sorry about that.

24 JUDGE BAXTER: 8-2 and 8-23, those are the Albion
25 ones?

1 MR. FLEMING: Right.

2 MR. MERICLI: Yes.

3 JUDGE BAXTER: And we have 8-11-03.

4 MR. MERICLI: Which is the Camp Hill.

5 JUDGE BAXTER: And those are the Camp Hill.

6 MR. FLEMING: This is the one he's trying to get
7 them not to show up, and I want to show you the reason why he
8 should --

9 JUDGE BAXTER: Let him finish. I want to make
10 sure we know what we're -- You are now making an argument that
11 --

12 MR. MERICLI: Two separate arguments.

13 JUDGE BAXTER: The first one is --

14 MR. MERICLI: All of them --

15 JUDGE BAXTER: All of them go under -- First of
16 all, Camp Hill goes separately and procedural default. But
17 all of them, if we get to the law, they all go.

18 MR. MERICLI: Right.

19 JUDGE BAXTER: Get to the merits of the law.

20 MR. MERICLI: Right.

21 MR. FLEMING: Yes.

22 MR. MERICLI: And there's still a possibility that
23 they all might go under procedural default, but I don't have
24 the evidence yet.

25 JUDGE BAXTER: You're waiting to see.

1 MR. FLEMING: I have the evidence that they
2 should.

3 CLERK: Let me interject, Robison, Wittel, Allen
4 and Kreider also they were retaliation claims that were kept
5 in.

6 MR. MERICLI: Oh, Robinson.

7 MR. FLEMING: Yeah, Robinson. He's at Albion.

8 JUDGE BAXTER: Where did they come from?

9 MR. MERICLI: Kreider, Wittel and Allen are at
10 Camp Hill.

11 CLERK: Are they at Camp Hill?

12 MR. MERICLI: Yes.

13 JUDGE BAXTER: Kreider, Wittel and who are Camp
14 Hill?

15 CLERK: Allen.

16 JUDGE BAXTER: And Robison investigated all of
17 these?

18 MR. MERICLI: No, he investigated the 8-23-02
19 incident involving the gate slamming.

20 MR. FLEMING: Right, and Weaver investigated the
21 law library incident.

22 MR. MERICLI: That's right.

23 JUDGE BAXTER: All right.

24 MR. FLEMING: I just wanted to say that he's
25 claiming procedural default, that if this is okay for me to

1 say that, if all of his -- in all of his answers to the
2 complaint he never raises anything pertaining to a procedural
3 default until now.

4 Also I want to say that I can show on the records that
5 I did make a good faith effort to make appeals, and at some
6 levels I was stopped by me not receiving certain things. But
7 I can't show --

8 MR. MERICLI: Here's a copy.

9 MR. FLEMING: I don't need that, I got too much
10 stuff over here now.

11 MR. MERICLI: Okay.

12 JUDGE BAXTER: What they say is you do not file
13 timely appeals.

14 MR. FLEMING: Right. In other words, they saying
15 I didn't appeal it. That's what I'm saying I can show that I
16 did make --

17 JUDGE BAXTER: Well, if you appealed it but
18 untimely, that's the procedural default.

19 MR. FLEMING: That's what he's saying.

20 JUDGE BAXTER: Right.

21 MR. FLEMING: The thing with that is that he's
22 saying procedural default, and what I'm trying to do, explain
23 is it's not a procedural default because I made a effort to
24 appeal it, but I never received what I was suppose to receive
25 from them.

1 JUDGE BAXTER: And that is in the 8-11 one that
2 the Camp Hill one?

3 MR. FLEMING: The 8-11 one with the misconduct for
4 affidavit. And I also sent a request to them indicating about
5 this affidavit I filed for the inmate, with a response that I
6 received from the unit manager saying that it is being
7 investigated.

8 JUDGE BAXTER: Which one is that? Camp Hill?

9 MR. FLEMING: Yeah, this is Camp Hill.

10 JUDGE BAXTER: Here's what they say, they say you
11 say those two numbers were appealed to the PRC or further, and
12 they said they've actually never received them, not that they
13 were untimely when they came in, he never received an appeal.

14 MR. FLEMING: That's what they saying.

15 JUDGE BAXTER: And you said you sent out appeals?

16 MR. FLEMING: I made every effort as
17 possible to --

18 JUDGE BAXTER: That doesn't answer it. Did you
19 send them out?

20 MR. FLEMING: Yeah, I sent them out.

21 JUDGE BAXTER: And do you have copies of that?

22 MR. FLEMING: Of the appeals? Yeah, I got copies
23 of the appeals I sent out right here.

24 MR. MERICLI: I have some rebuttal.

25 MR. FLEMING: That number, 8592325.

1 JUDGE BAXTER: 8592325 and 8592864.

2 MR. FLEMING: Yeah. Here's the appeal right there
3 that they said never received (indicating), and here's a
4 grievance that I -- grievance that I filed that they rejected.

5 JUDGE BAXTER: Sent 8-14-03.

6 MR. FLEMING: Here's a grievance that I filed
7 (indicating) that they said you can't do it under the 801. I
8 said, look I don't know what happened but I made an appeal.
9 That's the grievance.

10 On the front is the response that they sent me back,
11 saying they reject this. So I couldn't go no further because
12 they wouldn't let me. They said we didn't receive nothing and
13 his grievance is denied because you ain't allowed to do that.

14 JUDGE BAXTER: Where do they say that?

15 CLERK: Front page.

16 MR. FLEMING: On the front. What's the date on
17 that?

18 JUDGE BAXTER: That you had to use an 801 not an
19 804.

20 MR. FLEMING: But I couldn't because they said --
21 they never said nothing. All I could do was try to file a
22 grievance to find out what was going on with my appeal.

23 JUDGE BAXTER: But you say you did send it on the
24 801 forms originally?

25 MR. FLEMING: That's the copy there.

1 JUDGE BAXTER: That's one of them, that's not --

2 MR. FLEMING: What's the other one you said of the

3 --

4 JUDGE BAXTER: 592864.

5 MR. FLEMING: 592864. Who was that by? Allen?

6 Oh, no, I guess you wouldn't know that. 592864. Is that at

7 Albion or Camp Hill?

8 JUDGE BAXTER: Camp Hill

9 MR. FLEMING: Camp Hill, 592864.

10 Wait a minute, wait a minute because I got two misconducts
11 from them.

12 JUDGE BAXTER: All right. Can you respond to this
13 one (indicating)? Do you know anything about this, Mr.
14 Mericli?

15 MR. MERICLI: My understanding is that he filed a
16 grievance instead of pursuing a misconduct appeal, and that in
17 other instances he didn't do anything, but then complained
18 that they had lost them. That's where I --

19 JUDGE BAXTER: It says on top, "sent 8-14".

20 MR. FLEMING: That's when I sent them. And they
21 said they ain't never received nothing.

22 MR. MERICLI: That's his own copy.

23 JUDGE BAXTER: Right.

24 MR. MERICLI: They say they didn't. The other
25 thing is -- The point is, if he's going to make this a factual

1 dispute, I mean I have records -- the records say what they
2 say. They say that he didn't do it right and he didn't do it
3 on time. He says that's a lie.

4 JUDGE BAXTER: Or that they didn't do it at all.

5 MR. MERICLI: Yeah, that he didn't do it on time,
6 he didn't do it right or that he didn't do it at all. And he
7 says that's a lie. But all I can do is rest on my records.

8 Now, the other point is this though, why didn't he
9 appeal it to the central office of the Department of
10 Corrections? Why didn't he appeal it there. He had a final
11 review. He could have taken the final review from that order.

12 MR. FLEMING: What's wrong --

13 MR. MERICLI: I've seen people take final reviews
14 from situations where they argue with the PRC and the
15 superintendent and go right to the top.

16 JUDGE BAXTER: They go to the top?

17 MR. MERICLI: That was his next step he gave up.

18 MR. FLEMING: What misconduct are you talking
19 about?

20 JUDGE BAXTER: The one at Camp Hill. Why didn't
21 you take it to the state?

22 MR. FLEMING: I did. So they said they -- How can
23 I take it to the state if they say we never received that?

24 JUDGE BAXTER: Now they're saying that you didn't
25 know that at the time you could have taken it and said, I

1 haven't received a response so I'm going to the next level.

2 MR. FLEMING: To the state?

3 JUDGE BAXTER: Yes.

4 MR. FLEMING: As a matter of fact, let me see
5 something.

6 MR. MERICLI: He could have taken their response
7 where they said you've been late and he could have taken that
8 up. People have -- I have seen cases where matters have been
9 remanded to be resolved.

10 MR. FLEMING: No, under the policy -- Right, they
11 -- You can't -- Only way -- Is nothing you can do about that.
12 Once they say that you -- we didn't receive your appeal and
13 you take it to the state, they -- you going to get the same
14 answer. We reviewed it and we see that you never -- that your
15 appeal was never received at the level of so and so and so,
16 whatever.

17 MR. MERICLI: Maybe so, but that's his obligation.

18 MR. FLEMING: My point is that I was
19 clearly stopped. This is the reason why I filed a grievance
20 and this affidavit right here, and -- In this right here
21 (indicating) this request, which I got a response on from the
22 unit manager saying it's being investigated.

23 JUDGE BAXTER: This is Camp Hill?

24 MR. FLEMING: Right -- Yeah, Camp Hill. Here's
25 the affidavit (indicating).

1 JUDGE BAXTER: The alleged assault is being
2 investigated, staff report no documents were disposed of and
3 only access --

4 MR. FLEMING: That's when he came to my cell.

5 JUDGE BAXTER: You were issued a misconduct.

6 MR. MERICLI: That's two different things.

7 JUDGE BAXTER: There's nothing here about -- This
8 is a request to a staff member, but I don't see anything in
9 here about your --

10 MR. FLEMING: About the --

11 JUDGE BAXTER: Your administrative grievances not
12 being heard.

13 MR. FLEMING: But that's --

14 JUDGE BAXTER: What are you trying to show by
15 this?

16 MR. FLEMING: What I'm saying is that I made -- I
17 came to staff and made it clear that they retaliated --
18 retaliated on me for -- due to the fact that I filed a
19 affidavit with this misconduct.

20 MR. MERICLI: Those are two separate things.

21 JUDGE BAXTER: But we don't know about the appeal
22 from this.

23 MR. MERICLI: One thing he's talking about there
24 is that's a separate thing in this case. That's the idea that
25 at some point supposedly -- It's a right of access claim that

1 you dismissed and it's out of this claim.

2 At some point they came in and he says they took legal
3 papers and prevented him --

4 MR. FLEMING: Yeah, but that's --

5 MR. MERICLI: -- From filing in his cell. And
6 what they -- From filing them in court, and they took them
7 from his cell. They said we never took any such thing. We
8 took excess blank requests slips out of your cell and so
9 forth.

10 That's a separate thing. It has nothing to do with the
11 question about what he thought was an unsatisfactory answer to
12 his grievance appeal, whatever. He didn't appeal it.

13 JUDGE BAXTER: Your argument is that simply when
14 they didn't answer, you say if you --

15 MR. FLEMING: I filed a grievance.

16 JUDGE BAXTER: When you went up, they would say
17 you didn't get a response below.

18 MR. FLEMING: It wouldn't make sense, so I filed a
19 grievance.

20 MR. MERICLI: Futility is what Booth versus Turner
21 in both the United States Supreme Court rejected. If he's
22 making a futility claim, he has an obligation, no matter how
23 vein or quixotic to follow the rules.

24 JUDGE BAXTER: To follow the rules. All right,
25 now -- Then review your argument against all of them other

1 than the -- Your argument on all of them --

2 MR. MERICLI: Is that none of them were ever
3 reversed.

4 JUDGE BAXTER: Is because they were all upheld on
5 appeal .

6 MR. MERICLI: That satisfies the alternative
7 burden of proof -- thank you -- of showing that when the
8 burden shifted to us. We can prove therefore that we would
9 have done the same thing.

10 JUDGE BAXTER: All right.

11 MR. MERICLI: Because -- That's what Carter -vs-
12 McGrady says and that's what Oliver -vs- Al -Haffez says.

13 JUDGE BAXTER: That's enough proof.

14 MR. MERICLI: And that's what Judge Circone
15 accepted.

16 JUDGE BAXTER: Okay.

17 MR. MERICLI: Here's the appeals on the Albi on
18 things. If I could have a second --

19 JUDGE BAXTER: Go ahead.

20 MR. MERICLI: -- To see how far he went with them.

21 MR. FLEMING: Here's a affidavit and that is shown
22 --

23 JUDGE BAXTER: Let me take a minute to read this.
24 While he's doing that I'll see if this is pertinent to what
25 we're looking into.

1 MR. FLEMING: That will show that ain't enough --
2 That ain't going to cut it, because it's clear and compelling
3 in the affidavit that it was a retaliation, and that all three
4 prongs were met, regardless of the appeal.

5 I also got --

6 JUDGE BAXTER: Hold on, I'm reading. Well, this
7 is totally different. This is an affidavit -- All about Mr.
8 Colbert.

9 MR. FLEMING: Yeah, that's the result of this
10 misconduct. That's my claim that due to the fact of me filing
11 this affidavit right here --

12 JUDGE BAXTER: To support Mr. Colbert's complaint
13 then you got --

14 MR. FLEMING: This misconduct.

15 JUDGE BAXTER: Except for the misconduct was
16 upheld -- His point is because no one dismissed the
17 misconduct, because they upheld it and you were found guilty
18 of the misconduct and it wasn't reversed on appeal, that as a
19 matter of law he says shows it wasn't retaliation. In other
20 words, that they would have said that anyway.

21 MR. FLEMING: Okay, let's say that's true. Now
22 understand the First Amendment of the Constitution, regardless
23 of what this institution or that he's established, this alone
24 gives me the right to file a grievance -- file this affidavit.

25 You're allowed to file this affidavit. What was the

1 grievance? Let me see the grievance.

2 JUDGE BAXTER: What was the grievance about?

3 MR. FLEMING: I didn't file no grievance. What
4 I'm saying --

5 JUDGE BAXTER: What was the misconduct they
6 charged you with?

7 MR. FLEMING: Refuse to obey an order, using
8 abusive, obscene or inappropriate language to an employee.
9 What I'm saying is for a minute I want to put this aside, and
10 saying under the First Amendment of the Constitution is that I
11 have a right to petition the government --

12 JUDGE BAXTER: They didn't stop you from putting
13 that in.

14 MR. FLEMING: No, they didn't stop me from putting
15 that in, that's my whole point.

16 JUDGE BAXTER: They charged you with that, you say
17 in retaliation.

18 MR. FLEMING: Yeah.

19 JUDGE BAXTER: But his argument is that charge was
20 upheld. You were found guilty and it was upheld. So it
21 doesn't matter whether you had put this in or not. If you did
22 that, they would have charged you with that anyway and you
23 would have been found guilty.

24 The point is, if you commit that violation it doesn't
25 matter why they charged you.

1 MR. FLEMING: Right.

2 JUDGE BAXTER: Other than if it's true or not.

3 MR. FLEMING: Right.

4 JUDGE BAXTER: Does that make sense?

5 MR. FLEMING: Yeah.

6 JUDGE BAXTER: So it doesn't -- I mean you had the
7 right to put this in (indicating).

8 MR. FLEMING: Right.

9 JUDGE BAXTER: But you didn't have the right to
10 commit that misconduct. You see what they're saying?

11 MR. FLEMING: I see what you're saying, yeah,
12 okay.

13 MR. MERICLI: These are the two -- This is what,
14 according to what they say at this point. And I could leave
15 the record open.

16 JUDGE BAXTER: These are on the Albion ones?

17 MR. MERICLI: These are on the Albion ones.

18 JUDGE BAXTER: He just got a FAX.

19 MR. FLEMING: What's that?

20 MR. MERICLI: The only one he took any appellate
21 action on are the 5-14 one with Tiller, and the 5-20 one with
22 Weaver at Albion.

23 Here's the superintendent one on Weaver (indicating),
24 and here's the spitting on Tiller (indicating).

25 JUDGE BAXTER: So you're saying all those four

1 have been procedurally defaulted?

2 MR. MERICLI: Those two there (indicating).

3 JUDGE BAXTER: Okay.

4 MR. MERICLI: What I'm saying, the same rationale
5 that applies to Kreider, Allen and Wittel at Camp Hill,
6 applies to those two at Albion. And it appears as well he
7 took no appeals on the remaining ones in Albion, so he
8 procedurally defaulted on the whole shebang.

9 MR. FLEMING: Can I say something?

10 JUDGE BAXTER: Yes.

11 MR. FLEMING: I filed grievances about what they
12 did to me and I sent it all the way to Camp Hill. I got the
13 copies. All the way to Camp Hill on both them.

14 JUDGE BAXTER: Which one? 5-14 and 5-20?

15 MR. FLEMING: Yeah, on 5-14. Now, any time that
16 you make a claim of an assault, the -- they put the 801 aside
17 and it's another -- it's a 001 abuse process that they take to
18 proceed through with that.

19 MR. MERICLI: I'm not talking about the two
20 excessive force claims that you brought. They're separate
21 things. We're talking about the retaliatory misconducts.

22 JUDGE BAXTER: Yes.

23 MR. MERICLI: I have two separate arguments which
24 you heard before, sir, which you heard about your excessive
25 force arguments. I'm not arguing that you procedurally

1 defaulted on your excessive force arguments.

2 MR. FLEMING: What are you arguing?

3 MR. MERICLI: I'm -- That you procedurally
4 defaulted on your retaliatory misconducts.

5 MR. FLEMING: Give me the numbers.

6 JUDGE BAXTER: The incidents are 5-14, 5-20, 8-2
7 and 8-23 you filed grievances.

8 MR. MERICLI: Appeals from misconducts.

9 JUDGE BAXTER: Excuse me, I'm sorry. Two separate
10 things. On both the misconduct on 5-14 and misconduct on 5-20
11 you appealed them to one level, but they say no appeal was
12 received to the highest level.

13 MR. FLEMING: 5-14 and 5-20.

14 JUDGE BAXTER: Now as to 8-2 and 8-23, Davison and
15 Maldonado, on both those cases, and Kreider on the second
16 case, they say you didn't appeal the misconducts at all.

17 MR. FLEMING: Oh.

18 JUDGE BAXTER: So on those four they're arguing
19 the same as they did in Camp Hill.

20 MR. FLEMING: All right.

21 JUDGE BAXTER: That they are procedurally
22 defaulted.

23 MR. FLEMING: All right.

24 JUDGE BAXTER: Let me take a look.

25 MR. MERICLI: You may keep those, your Honor.

1 JUDGE BAXTER: All right, 5-14 you were found
2 guilty and then you appealed on the 141 form. No new evidence
3 was given in appeal. They sustained the misconduct and
4 sanctions.

5 MR. FLEMING: All right.

6 JUDGE BAXTER: From there you needed to go to Camp
7 Hill, all right.

8 MR. FLEMING: So the one on 8-20, right, I got the
9 8-23 appeal right here. Final review right here (indicating)
10 for the 8-23. This is the 8-23 right here. I sent it all the
11 way to Camp Hill.

12 JUDGE BAXTER: Hold on, let me take a look because
13 that one we don't seem to have anything.

14 MR. FLEMING: I got it right there, that's the
15 final review.

16 JUDGE BAXTER: Let me see. Let me see. All
17 right. That's the misconduct charge.

18 MR. FLEMING: That's my version. That's the
19 hearing examiner's results.

20 JUDGE BAXTER: All right. And were you found
21 guilty.

22 MR. FLEMING: That's my appeal to the PRC.

23 JUDGE BAXTER: Let's see if I have the right
24 number. 829, okay. Yes, and appealed.

25 MR. FLEMING: That's the PRC saying we received

1 that. We received your appeal.

2 JUDGE BAXTER: Okay. Okay.

3 MR. FLEMING: That's the results.

4 JUDGE BAXTER: They affirmed it.

5 MR. FLEMING: That's my appeal final review to
6 Camp Hill.

7 JUDGE BAXTER: Final level.

8 MR. FLEMING: And that's the appeal to the
9 superintendent.

10 JUDGE BAXTER: All right, that one's done.

11 MR. MERICLI: That's 8-23?

12 JUDGE BAXTER: 8-23. Look, that's all the way up.

13 MR. FLEMING: What's the other one?

14 MR. MERICLI: If he has it. They said they
15 couldn't locate it.

16 MR. FLEMING: What's the other one?

17 JUDGE BAXTER: 8-2, 5-20 and 5-14.

18 MR. FLEMING: 8-2?

19 JUDGE BAXTER: 8-2, August 2nd, that's the cuff
20 key one apparently.

21 MR. MERICLI: 8-2 is the cuff key.

22 MR. FLEMING: That's the one I think that I was
23 stopped, too. Let me see.

24 JUDGE BAXTER: This is --

25 MR. FLEMING: All the way up. Or is it 8-20?

1 It's 8-20.

2 JUDGE BAXTER: The 8-20 is gone now.

3 MR. MERICLI: It doesn't have a defendant.

4 JUDGE BAXTER: It doesn't have a defendant.

5 MR. FLEMING: Don't have no tapes either.

6 MR. MERICLI: If you note, they do say that we
7 can't locate --

8 JUDGE BAXTER: Okay, so they just didn't locate
9 it. It's harder to find all these things than I thought.

10 MR. MERICLI: Not if he's moved from place to
11 place and also if he's not there anymore.

12 MR. FLEMING: Especially if I'm not getting what
13 I'm suppose to.

14 JUDGE BAXTER: 5-20 he received a misconduct. It
15 was sustained. Now we have to figure out if he went further.
16 Okay, let's start here.

17 MR. FLEMING: Here you go, the 8-2 (indicating).

18 JUDGE BAXTER: I want you to look at the two May
19 ones.

20 MR. FLEMING: Here's the one right here
21 (indicating). They said they got it right there and I --

22 JUDGE BAXTER: But you never got a final --

23 MR. FLEMING: I never got nothing. I never got
24 nothing.

25 JUDGE BAXTER: Now start looking for the May 14th

1 and the May 20th ones. We have you going to the first appeal
2 but not the final.

3 MR. FLEMING: May 14th and May 20th. What they
4 say? I never went to the final, too?

5 JUDGE BAXTER: Yes.

6 MR. FLEMING: Yes, I did, right here (indicating),
7 final review. All them numbers was all the other ones I was
8 appealing, too. See look, May 20th, 311185. See that, 311185
9 (indicating).

10 JUDGE BAXTER: Let's see. Which one?

11 MR. FLEMING: May 20th.

12 JUDGE BAXTER: The May 14th?

13 MR. MERICLI: A297398.

14 MR. FLEMING: May 14th. I think that's over
15 there.

16 JUDGE BAXTER: Okay.

17 MR. FLEMING: It's on here (indicating). And
18 that's on there (indicating), too. All of them is on there.
19 There you go. I knew I was going to find it. Misconduct
20 A297398.

21 CLERK: May 14th.

22 MR. MERICLI: Okay.

23 MR. FLEMING: And May 20th.

24 JUDGE BAXTER: 297351 is May 20th. 297344.

25 MR. MERICLI: That's not on --

1 JUDGE BAXTER: 31185 and 297367.

2 MR. MERICLI: 31185 is Captain Weaver's 5-20.

3 JUDGE BAXTER: Okay. That's not -- That's 5-20.

4 Here it says --

5 MR. MERICLI: Could I see that just to see what it
6 is, and if I can tell if that's an issue.

7 MR. FLEMING: Captain Weaver's.

8 MR. MERICLI: No, it looks like -- All right, this
9 shows that he took through final review the 5-14, and the
10 5-20.

11 JUDGE BAXTER: Okay.

12 MR. MERICLI: Okay, he also has shown he's taken
13 through final review --

14 JUDGE BAXTER: 8-23.

15 MR. MERICLI: 8-23. So the only one we can't tell
16 whether he's appealed at all is 8-2.

17 JUDGE BAXTER: 8-2.

18 MR. FLEMING: That's the one --

19 MR. MERICLI: So then my argument has changed to
20 the extent that it remains procedural default on Camp Hill,
21 but no procedural default on the three out of the four
22 Albion's. And it's an open question on the fourth one, but it
23 looks like the odds favor him that he didn't procedurally
24 default. I'm not sure, but I'm not going to make --

25 JUDGE BAXTER: You're not going to fight on that?

1 MR. MERICLI: I'm not going to make a fuss when he
2 shows me three out of four, the fact he procedurally defaulted
3 on Camp Hill but not on the Albion's.

4 JUDGE BAXTER: Okay.

5 MR. MERICLI: So what I'm arguing is, they're out
6 because they were never set aside. Just under Carter versus
7 McGrady, which is what I started arguing in the first place.

8 And as far as the Camp Hill ones goes, not only does
9 that apply but he procedurally defaulted.

10 JUDGE BAXTER: I understand your argument.

11 MR. MERICLI: That's where we're at right now.

12 JUDGE BAXTER: All right. That's a legal
13 argument. I'm going to take a look at the law to see if
14 that's good enough or not. I'm also going to take a look at
15 his argument under the case that he gave me.

16 MR. FLEMING: I don't even remember.

17 JUDGE BAXTER: The Thomas case.

18 MR. MERICLI: And also --

19 JUDGE BAXTER: And we have to deal with Camp Hill
20 before they start driving at two o'clock. All right, I'll
21 take a look at that first and make a ruling on that.

22 Do you have a copy of the Thomas case?

23 MR. FLEMING: No, I ain't got that.

24 JUDGE BAXTER: I'll make a copy for you.

25 MR. FLEMING: I just want to say that -- Okay, so

1 you said the retaliation claim and this misconduct is
2 separate?

3 JUDGE BAXTER: Well, he made two arguments. The
4 retaliation claims, he said the ones in Albion were
5 procedurally defaulted. He's now taken back on that, but he
6 said I should still dismiss them before we go to trial because
7 you were found guilty of all of them and none of them was
8 overturned on appeal, so therefore, you don't have -- it was
9 the argument I said to you before, you have the right to make
10 the grievance but you don't have a a right to commit the
11 misconduct. That's his argument.

12 MR. FLEMING: All right.

13 JUDGE BAXTER: So I'm going to take a look at the
14 law now.

15 MR. FLEMING: Okay. Now my point is that the
16 grievances that I filed, right, contain -- He's making a
17 argument what is under the law that I can -- that I have a
18 right to do that without being retaliated on.

19 JUDGE BAXTER: What I want to check -- I'll tell
20 you what, I want to check. I want to see if you're being
21 found guilty the whole way up is enough or if I need testimony
22 that says I don't care that they filed a misconduct, I would
23 have charged him with this anyway because he did it. I never
24 thought about the misconduct, I saw he did this and I charged
25 him.

1 MR. FLEMING: Okay.

2 JUDGE BAXTER: I have to see if I need that under
3 the law or if the fact that you were never overturned -- your
4 misconduct was never overturned is good enough.

5 MR. FLEMING: Okay.

6 MR. MERICLI: Do you need a copy of Carter versus
7 McGrady at all?

8 JUDGE BAXTER: I'm sure I have that.

9 MR. MERICLI: Okay, if not --

10 JUDGE BAXTER: That's the case you're relying on?

11 MR. MERICLI: Yes, Third Circuit case, and we can
12 have a copy made to Mr. Fleming.

13 MR. FLEMING: He going to copy it now --

14 MR. MERICLI: That's a different one.

15 MR. FLEMING: That's a different one?

16 JUDGE BAXTER: You're saying that answers that
17 question?

18 MR. MERICLI: Yes, I think it does.

19 JUDGE BAXTER: Okay. And it's never been
20 overturned or reversed. I also wanted to give you Mr.
21 Weaver's response in which he makes it clear that these are
22 the proper videotapes and he served the other ones. So this
23 is in the nature of an affidavit that validates the entry of
24 these. All right.

25 MR. FLEMING: I don't think that's enough. Man, I

1 need --

2 JUDGE BAXTER: You're going to get a chance to
3 look at them, too. Let me read something. Just a second.

4 MR. FLEMING: Okay.

5 JUDGE BAXTER: I've seen this case a million
6 times, but I thought it simply said the burden shifts.

7 MR. MERICLI: It does, but it can be met by a
8 presentation. It's a summary judgment case and it can be met
9 by presentation of proof that he was convicted.

10 JUDGE BAXTER: Okay. Someone else -- Don't forget
11 your thought, but give me a minute.

12 MR. FLEMING: All right. This is a great time to
13 make a argument about -- when you had plenty of time --

14 JUDGE BAXTER: Hold it. Hold it. It's waived.
15 That's your argument.

16 MR. FLEMING: That he waived the exhaustion issues
17 because he never raised them in any motion prior to this. And
18 you can look at them.

19 JUDGE BAXTER: Okay.

20 MR. FLEMING: And I'm saying we can proceed.

21 JUDGE BAXTER: And I go crazy about that, saying
22 we need more information at each stage. That's your defense,
23 but let me read this.

24 MR. FLEMING: I can show you the law where it say
25 you must raise exhaustion at the earliest possible stage, if

1 not, dismissed.

2 JUDGE BAXTER: Here's the language that Mr.
3 Mericli is relying on. "Given the quantum of evidence of
4 Carter's misconduct we cannot say that the prison officials
5 decision to discipline him for his violations of prison policy
6 was not within the broad discretion that we must afford them.
7 Even if prison officials were motivated by animus to jailhouse
8 lawyers, Carter's offenses such as receiving stolen property
9 were so clear and overt that we can say that the disciplinary
10 action against Carter was retaliatory."

11 So, did they actually look at the evidence or did they
12 just look at the fact that it wasn't overturned?

13 MR. MERICLI: They looked at the fact that it
14 wasn't overturned. That's the way Judge Circone read it.

15 MR. FLEMING: Can you read that --

16 MR. MERICLI: There's no doubt he admits he spit
17 on the library window.

18 MR. FLEMING: Do you have proof of that?

19 MR. MERICLI: Your statement during the medical
20 examination.

21 MR. FLEMING: I want to see that. I want to see
22 that.

23 MR. MERICLI: It's on tape.

24 MR. FLEMING: I want to see that, to see the
25 proof.

1 CLERK: Do you have this one (indicating)?

2 MR. FLEMING: What's the summary judgment number,
3 Rule 50 --

4 JUDGE BAXTER: This is Rule 50. This is
5 different.

6 MR. FLEMING: What I'm saying is this --

7 JUDGE BAXTER: You have your book there.

8 MR. FLEMING: Under the rule, right, it says exhaustion must
9 be raised at the earliest possible stage such as motion to
10 dismiss or motion for summary judgment. If these issues are
11 not raised prior to that, that they are waived.

12 JUDGE BAXTER: What about procedural default?
13 That's a little different.

14 MR. FLEMING: I mean -- What's the different
15 between exhaustion and procedural default?

16 JUDGE BAXTER: Exhaustion means you didn't take it
17 up. Procedural default means you may have taken it up but it
18 may have been wrong or you didn't take it up.

19 MR. FLEMING: I'm saying even if that's possible,
20 if you look at all of his pleadings it would not say a
21 procedural default or a failure to exhaust --

22 JUDGE BAXTER: That's true, you had never brought
23 it up before.

24 MR. MERICLI: That's true.

25 MR. FLEMING: Never.

1 JUDGE BAXTER: All right. Do we have anything in

2 --

3 MR. FLEMING: Can I run to the bathroom real
4 quick?

5 JUDGE BAXTER: We sure can. We'll go off the
6 record for a minute.

7 (At which time, 10:50 a.m., a recess was taken
8 and proceedings resumed at 11:10 a.m.)

9 JUDGE BAXTER: Go ahead.

10 MR. FLEMING: I have a question about the hygienic
11 items and cleaning supplies. When you said --

12 JUDGE BAXTER: Judge McLaughlin disagreed with me,
13 he thought soap wasn't enough.

14 MR. FLEMING: He thought that wasn't enough?

15 JUDGE BAXTER: He threw that one out.

16 MR. FLEMING: All right.

17 JUDGE BAXTER: He went through my R and R, he
18 accepted some things and didn't accept others. One he didn't
19 accept was the soap. And one he didn't accept was my wanting
20 to dismiss the wicker count. So you got that one back in, but
21 you lost this one.

22 MR. FLEMING: All right.

23 JUDGE BAXTER: All right.

24 MR. MERICLI: If I may, one of the reasons why
25 there was yet another problem with the case was, you will --

1 you'll want to see -- If you wished, you could see they've an
2 elaborate affidavit about the soap situation.

3 We took off in that direction right away and in terms
4 of grievance, in terms of procedural default of the grievance
5 in terms of the soap and what kind of soap he had. And they
6 completely --

7 JUDGE BAXTER: Scrapped that.

8 MR. MERICLI: Junked that and go in a different
9 direction.

10 JUDGE BAXTER: So many problems with this case,
11 Mr. Fleming, that happen just time-wise. If you look
12 at this, it's a thick docket sheet. But when you go through,
13 at some point I -- I'm sure the circuit is going to do again.
14 It took us a year before we got people served and we were on
15 the road. Then after that we lost you for awhile because you
16 got out, and then I thought the cause was going to be
17 dismissed for failure to prosecute. And then you popped up.
18 But it's three years old in that record.

19 (Off-the-record discussion.)

20 CLERK: We have a message from Cathy that said you
21 were waiting for this (indicating).

22 MR. MERICLI: Yeah.

23 CLERK: Two tapes were mailed on 10-4.

24 MR. MERICLI: Yes.

25 CLERK: Attempted delivery on 10-28 and the post

1 office I left a notice.

2 MR. MERICLI: Okay, thank you very much.

3 MR. FLEMING: Nobody must have been home.

4 MR. MERICLI: I guess that's it. I just wanted
5 everybody to know what we did.

6 MR. FLEMING: Sometime we -- the family be
7 shopping and going places, and we weren't home.

8 JUDGE BAXTER: That had to be signed for, that's
9 what happened.

10 MR. FLEMING: Yeah.

11 JUDGE BAXTER: Where can we set these tapes up so
12 he can look at these? I don't want him to sit and waste his
13 time while I consider the motions. So I thought maybe you'd
14 want to look at those tapes as I'm considering the motion. If
15 I want to go in and look at them I will come in.

16 MR. FLEMING: I do, but that ain't even really --
17 I mean that's just some of what --

18 JUDGE BAXTER: I know, it's some of the evidence.
19 But you wanted those two, so you should take a look at them.

20 MR. FLEMING: I will look at them.

21 JUDGE BAXTER: So you won't be wasting your time.
22 If you can contact your folks at Camp Hill and tell them don't
23 head out yet, but I'm probably not going to have a decision on
24 that until after the noon hour, after one.

25 MR. MERICLI: That's fine. They told me two

1 o' clock.

2 JUDGE BAXTER: Tell them to make it three.

3 MR. MERICLI: Okay.

4 MR. FLEMING: I wanted to ask you something else.

5 JUDGE BAXTER: Yes.

6 MR. FLEMING: About the Rule 56, right, and the
7 Rule 55. Anything dealing with exhaustion and procedural
8 default must be raised in early pleadings.

9 JUDGE BAXTER: I know you've said you think he
10 waived that --

11 MR. FLEMING: That's waived.

12 JUDGE BAXTER: In fact, I have someone doing the
13 research.

14 MR. MERICLI: I put that in my answer.

15 JUDGE BAXTER: The case where that came out is
16 actually a new case, it's called Spruiell. The Spruiell case
17 was the first time the Third Circuit ever put a procedural
18 default component in a civil rights case. We used to do that
19 in habeas but not here. I am not clear -- And in habeas,
20 procedural default can come out any time.

21 MR. FLEMING: In habeas, yeah.

22 JUDGE BAXTER: I wanted to see if Spruiell or any
23 cases after it said --

24 MR. FLEMING: All right.

25 JUDGE BAXTER: -- That there was a waiver time.

1 MR. FLEMING: All right.

2 JUDGE BAXTER: I don't know if there's an answer
3 to that, because Spruill is pretty new. It's what? Two years
4 old. So there may not be an answer to that or there may be an
5 answer. I know that's your argument but I don't know. I have
6 to check and see what cases have come up after. I don't have
7 that encyclopedia mind where I can remember every one.

8 MR. MERICLI: In view of the fact that a motion to
9 dismiss wasn't decided until last April and wasn't finalized
10 until last May, and I filed a motion for summary judgment
11 instead of answer after the summary judgment was denied
12 without prejudice, it was only then that I found an answer and
13 I did raise it in affirmative defenses to the answer.

14 JUDGE BAXTER: To the answer. All right.

15 MR. MERICLI: And I had been ordered -- As you
16 recall, the prison litigation format does not require me to
17 file an answer until you order me.

18 JUDGE BAXTER: And you pointed that out in one of
19 your pleadings. I have to tell you, I went and looked that
20 up. That just blew me away, because it's in our standard
21 service order, so I never -- It never was part of my focus.
22 So it's constantly out there in the standard order, but at
23 this stage it was never anything that was on my radar screen.

24 So I looked at the -- And you're right, and I did, it
25 has to be required. That's just so that you don't have extra

1 work, but we're at the stage where that would be the obvious
2 thing to do.

3 MR. MERICLI: I consider it's an obnoxious rule
4 and I don't use it.

5 JUDGE BAXTER: I appreciate it.

6 MR. MERICLI: Early on Congress was worried about
7 frivolous, time consuming litigation.

8 JUDGE BAXTER: Yes, sir.

9 MR. FLEMING: That's it for me.

10 JUDGE BAXTER: Okay, do you have my 9-2 order
11 here?

12 CLERK: 9-2 of this year? Yeah.

13 JUDGE BAXTER: All right, we will get back
14 together at 1:30, that gives you two hours.

15 (At which time, 11:30 a.m., a recess was taken
16 and proceedings resumed at 1:40 p.m.)

17 JUDGE BAXTER: All right, we're back on the
18 record, I have considered the Rule 50 motion by defendants for
19 judgment for defendants at this time, and I am going to deny
20 the motion. I am going to deny the motion specifically
21 because the Rule 50 requirements -- The Rule 50 does not apply
22 to non-jury trials, and I could not find any support that we
23 could do that in a non-jury trial in the same way that a
24 directed verdict does in the way that we know directed
25 verdicts.

1 It is -- The decision is made without any prejudice to
2 you to make a motion under Rule 52(c), a judgment on partial
3 findings, which is appropriate in a non-jury trial at the
4 close of the evidence of plaintiff's case.

5 All right, the reasoning on that is that Rule 50 also
6 wants to give the plaintiff an opportunity to present
7 evidence, as you know, and the evidence that you presented to
8 me this morning has to go through the trial requirements.
9 It's not being presented on a 56 style motion, on a summary
10 judgment style motion.

11 So we'll proceed on all counts that are left in the
12 case tomorrow morning as planned. But Mr. Mericli has the
13 opportunity after you have presented your case, if he wishes
14 to renew his motion under Rule 52(c) saying there's no use
15 going ahead, he didn't do what he was suppose to do to prove
16 it, you can decide now.

17 MR. FLEMING: I'll do that right now.

18 JUDGE BAXTER: At any rate, we are going ahead
19 tomorrow, and his motion is denied at this time.

20 MR. MERICLI: Thank you, your Honor.

21 JUDGE BAXTER: I couldn't find anything. If you
22 find anything -- Because Rule 50 also applies through trial,
23 that it's something that can be done on a bench trial. I'll
24 leave that to you.

25 MR. MERICLI: Well, I'd be more than happy, your

1 Honor, at this point if there's no way to file a legal motion
2 to forestall the trial, if there's absolutely no manner in
3 which that can be made, I'd be more than happy to wait until
4 the close of the evidence in the bench trial.

5 JUDGE BAXTER: Okay.

6 MR. MERICLI: And I can renew the motion.

7 JUDGE BAXTER: I can't think of anything. I mean
8 52(c) requires full hearing of the non-moving party. Directed
9 verdicts aren't available, of course, to non-jury. And 50 is
10 directed towards jury trials.

11 MR. MERICLI: That's -- When I filed it, it was
12 still a jury trial.

13 JUDGE BAXTER: Certainly. So let's put our
14 thinking caps on. I can't think of any. That's up to you.

15 MR. MERICLI: Neither can I.

16 JUDGE BAXTER: All right.

17 MR. MERICLI: The only way I could think about it
18 was to make a motion for a judgment on the pleadings at this
19 point.

20 JUDGE BAXTER: In the same manner as a summary
21 judgment. I suppose it wouldn't be a judgment on the
22 pleadings though because you've given me evidence, you've
23 shown me evidence that things weren't exhausted, and judgment
24 on the pleadings wouldn't include that stuff.

25 The summary judgment would, but at this point evidence

1 is treated -- When we're going to trial, it's an evidentiary
2 review, differently than an evidentiary review of a summary
3 judgment. So I think it's too late for that as well.

4 MR. MERICLI: Very good, your Honor, thank you.

5 JUDGE BAXTER: All right, so let's talk about
6 tomorrow. Mr. Mericli has been in cases where the opposing
7 party has represented himself or herself before, so he knows
8 that I give you some discussion about how we're doing things
9 and how we're doing, and I review what's left in the case as
10 we did this morning. But I'll go over it again to make sure
11 we're on the same pathway, something I wouldn't do if you had
12 an attorney here.

13 I have to walk a fine line. I'm not allowed to
14 practice on your behalf, so if I ever get close to that, Mr.
15 Mericli will jump up and down and tell me so. And I'm
16 counting on him to tell me so. All right?

17 MR. FLEMING: All right.

18 MR. MERICLI: Thank you, your Honor.

19 JUDGE BAXTER: The trial process is
20 straightforward. You've brought the complaint, you're the man
21 complaining, so you go first. And you have to prove the two
22 counts.

23 You have to prove, number one, that excessive force
24 under the Constitution was used against you and the
25 requirements of that. And secondly, you have to prove that

1 you were retaliated against in violation of the United States
2 Constitution by frivolous misconducts being given against you
3 for no reason, and in retaliation for your exercising your
4 First Amendment rights.

5 You can do that either through testimonial evidence or
6 through documents, through documentary evidence. Testimonial
7 evidence can be by you testifying or by others testifying
8 where you ask questions. When you're testifying it's hard to
9 ask yourself questions and answer them. It looks kind of
10 strange. So the way we do it, if you're testifying, you take
11 the stand and you --

12 MR. FLEMING: Tell my evidence.

13 JUDGE BAXTER: -- Present your story. Anything
14 you say in that presentation can be questioned on
15 cross-examination by the defense counsel. Anything that any
16 witnesses you call say, can likewise be questioned on
17 cross-examination.

18 MR. FLEMING: I can call witnesses on -- If I want
19 to direct a witness over there, I can call him up, right?

20 JUDGE BAXTER: Yes, you can call any witness that
21 is in the courtroom. You can call a defendant to the stand
22 and say you want to question the defendant.

23 How it works when you're questioning a defendant, if
24 you believe that the person you're questioning is a hostile
25 witness, you can ask the Court for permission to ask leading

1 questions. If not, when you're presenting your case, you
2 cannot ask leading questions like, isn't it true that --

3 MR. FLEMING: Yeah.

4 JUDGE BAXTER: You have to ask questions like,
5 what happened?

6 MR. FLEMING: The impeach -- And by the
7 impeachment on prior inconsistent statements.

8 JUDGE BAXTER: You can do that.

9 MR. FLEMING: On cross or direct.

10 JUDGE BAXTER: You can ask permission to treat the
11 witness as a hostile witness, and if it's granted, you can
12 impeach. You can always impeach the credibility of a witness.
13 It's typically you don't impeach the credibility of a witness
14 that's testifying on your behalf.

15 MR. FLEMING: Right.

16 JUDGE BAXTER: So if you call one of the
17 defendants, obviously they're not testifying on your behalf,
18 and you can obviously try to impeach their testimony.

19 MR. MERICLI: If it will make things simpler, your
20 Honor, I will allow him to call any of my defendants as if on
21 cross-examination.

22 JUDGE BAXTER: Okay, that's been stipulated to.
23 We're done.

24 MR. FLEMING: All right.

25 MR. MERICLI: The only other point I wanted to

1 make because I think it's appropriate, is that Mr. Davison
2 took a medical retirement from the DFC, so we don't have any
3 --

4 JUDGE BAXTER: All right, he's from Albion.

5 MR. MERICLI: He's not going to be there. He was
6 a named defendant. However, he was involved in the 8-23, the
7 August 23rd gate kicking incident, which I think the best
8 evidence, so to speak, is the video. And he was also involved
9 in the handcuff key for which there is no video. But in both
10 of the incidents, both 8-23 the kicking of the gate and the
11 handcuff key, Corrections Officer Maldonado, who was the
12 person also there --

13 JUDGE BAXTER: He was also there?

14 MR. MERICLI: He was also there, will be present.

15 JUDGE BAXTER: We don't know where he is?

16 MR. MERICLI: We don't know where he is.

17 JUDGE BAXTER: This happens sometimes, once
18 they're out of the system, they quit or retire, these guys
19 just don't keep track of them. It drives me nuts. It's not
20 your fault.

21 MR. MERICLI: I could probably find him through
22 the state retirement --

23 MR. FLEMING: That's cool.

24 JUDGE BAXTER: If you win, a judgment will be
25 entered against him, whether or not he's here.

1 MR. FLEMING: That's cool. I mean, that's cool.

2 The rest of them going to be there?

3 MR. MERICLI: Yes.

4 MR. FLEMING: All right, we can stipulate on that.

5 JUDGE BAXTER: And Maldonado will be there.

6 MR. FLEMING: And he faces it as if he was there?

7 MR. MERICLI: Absolutely.

8 JUDGE BAXTER: Yes.

9 MR. FLEMING: This is the thing --

10 MR. MERICLI: It's at his risk.

11 MR. FLEMING: Now, I mean it's a video of this
12 incident about the key --

13 JUDGE BAXTER: You can present that as evidence if
14 you want the Court to see it --

15 MR. FLEMING: But they have don't have it.

16 JUDGE BAXTER: -- Of that --

17 MR. FLEMING: But they don't have it.

18 MR. MERICLI: You'll have to cross-examine Captain
19 Weaver.

20 JUDGE BAXTER: Yes, you'll cross-examine Captain
21 Weaver.

22 MR. FLEMING: How can I approach that?

23 JUDGE BAXTER: You have people telling you before
24 trial that there were not cameras in that section, number one.
25 If you're talking about the wicker incident --

1 MR. FLEMING: Right.

2 JUDGE BAXTER: -- They say there aren't cameras.

3 You're saying there are, so you have to try to get testimony
4 supporting your statement.

5 MR. FLEMING: All right.

6 JUDGE BAXTER: And your testimony will be given
7 and I'll decide whose testimony to believe on that. But
8 there's no way you can get a videotape that's not there.

9 MR. FLEMING: That's right. That's true.

10 JUDGE BAXTER: So we can't --

11 MR. FLEMING: Basically, I'm going to have to use
12 my cross-examining and my direct skills --

13 JUDGE BAXTER: That's right. You'll have to tell
14 your story. And likely they'll tell a different story about
15 what happened, and you'll have to cross-examine.

16 MR. FLEMING: Now about these affidavits I got, I
17 got some sworn affidavits.

18 JUDGE BAXTER: From?

19 MR. FLEMING: From --

20 JUDGE BAXTER: People who saw it?

21 MR. FLEMING: Defendants.

22 JUDGE BAXTER: From defendants?

23 MR. FLEMING: But maybe one or two of them got
24 dropped. Can I still use them?

25 JUDGE BAXTER: You can use anything that was used

1 under oath to impeach -- You know, anything that was said,
2 that he said at another time to impeach. But if you use an
3 affidavit from someone who's not there and you said, this
4 person said this, are you denying that? That's not an
5 impeachment. You're asking them a direct question.

6 MR. FLEMING: He can make --

7 JUDGE BAXTER: He can't make any objection on
8 that.

9 MR. FLEMING: All right.

10 JUDGE BAXTER: You have the rules of evidence in
11 front of you. Any of those objections can be made by either
12 of you. But I can't tell you how best to impeach a witness.
13 You can bring up any document you have if they have a sworn
14 statement that they've said, that's prior inconsistent
15 statements.

16 MR. FLEMING: All right, now about this discovery
17 that --

18 JUDGE BAXTER: Now documents, you understand you
19 have to authenticate documents unless Mr. Mericli will agree
20 that they are authenticated. Before we get there --

21 MR. FLEMING: I'd like to make a motion.

22 JUDGE BAXTER: -- I'd like to talk about that now.
23 Why don't you tell me what sorts of evidence you're planning
24 to present? We don't do surprises in the Federal Court. We
25 know what we're coming in with before we come in.

1 MR. FLEMING: All right, I'm going to present --

2 JUDGE BAXTER: I also won't allow interruptions.

3 When it's your turn to question, the only interruptions he can
4 make are objections, and they're ruled upon, and then you can
5 continue. Same when he's examining a witness. If you
6 disagree with it, no antics, no, oh, that's not right. You
7 wait until it's your turn to examine the witness, all right?

8 MR. FLEMING: All right. I'm going to present --

9 JUDGE BAXTER: I understand you're going to
10 present your testimony, you're going to take the stand?

11 MR. FLEMING: And as I'm doing it I'm going to lay
12 out my exhibits.

13 JUDGE BAXTER: And the only --

14 MR. FLEMING: All of them.

15 JUDGE BAXTER: The only other witnesses you're
16 going to present are defendants?

17 MR. FLEMING: See, I had put in some subpoenas but
18 I don't know if they --

19 JUDGE BAXTER: If they're going to show up?

20 MR. FLEMING: I don't know. We start tomorrow,
21 and I don't know if you're aware of any of it, I wanted to
22 subpoena the medical -- the other medical examiner that said
23 he examined me, that he said he don't got no tape.

24 MR. MERICLI: His name is Physicians Assistant Telega.

25 MR. FLEMING: He's going to be there?

1 MR. MERICLI: Yes.

2 MR. FLEMING: That's cool then. What else? What
3 about Lieutenant Jones?

4 MR. MERICLI: Lieutenant Jones is not going to be
5 there. He's not a named defendant. He has his report, which
6 is part of Weaver's interrogatories and verified by an
7 affidavit. I was going to introduce them. There's a federal
8 rule of evidence that allows the best report to be introduced.

9 MR. FLEMING: This is the original, this is the
10 complaint -- Who I got to show this to?

11 JUDGE BAXTER: You're going to introduce a
12 complaint as an exhibit on the record? You don't
13 need to do that.

14 MR. FLEMING: Okay. I'll take this --

15 JUDGE BAXTER: As a general rule, evidence are
16 facts that you are trying to prove, not allegations that you
17 made. The complaint is allegations. There's a difference
18 between what you allege happen and facts that will support
19 those allegations.

20 MR. FLEMING: Yeah.

21 MR. MERICLI: If I may, in light of our experience
22 in the past, I have marked all the affidavits as exhibits that
23 -- and answers to the interrogatories, coupled with them, that
24 I provided to Mr. Fleming. So if he wanted to use any of
25 those things we could go through --

1 JUDGE BAXTER: If it's a verified complaint, I
2 suppose -- He's going to testify anyway. I don't think I need
3 to go through that.

4 MR. MERICLI: I just wanted to tell you that I --

5 JUDGE BAXTER: All of those are going in as
6 exhibits?

7 MR. MERICLI: Exhibit "A" is the first tape, "B"
8 is the second tape. And I will specifically kindly request
9 the Court to keep custody of these.

10 JUDGE BAXTER: Yes, I'm going to.

11 MR. MERICLI: And I can formally move them in.

12 JUDGE BAXTER: He's seen them now.

13 MR. MERICLI: Or he can formally move them in.

14 JUDGE BAXTER: All right. But they're
15 appropriately marked as Defendant's Exhibit.

16 MR. MERICLI: These are the misconducts
17 (indicating). We know now that they were all appropriately
18 appealed.

19 JUDGE BAXTER: Okay.

20 MR. MERICLI: These are all the misconducts. He
21 did not procedurally default on them.

22 JUDGE BAXTER: Okay.

23 MR. MERICLI: They were Albion.

24 JUDGE BAXTER: Okay.

25 MR. MERICLI: They're marked as Exhibit "C", and

1 he has those. If he wants another copy, he can have these.

2 MR. FLEMING: That's all right.

3 JUDGE BAXTER: One of the things he's already
4 marked, that means you both agree on them.

5 MR. MERICLI: Here's the medical -- Here are the
6 medical records (indicating) --

7 JUDGE BAXTER: Okay.

8 MR. MERICLI: -- From Nurse Klos and from
9 Physicians Assistant Telega.

10 JUDGE BAXTER: He has a copy of those already?

11 MR. MERICLI: He should.

12 MR. FLEMING: Through -- I don't know. Let me see
13 that. Here, you take this (indicating).

14 JUDGE BAXTER: That one is yours.

15 MR. MERICLI: That would be Exhibit "D".

16 JUDGE BAXTER: He's going to put these into
17 evidence.

18 MR. MERICLI: This is Weaver's grand affidavit
19 with all the exhibits (indicating). That would be --

20 JUDGE BAXTER: I looked at that already.

21 MR. MERICLI: No, you looked at the second one
22 which verifies the tapes and says there are no further tapes.
23 So, this is Weaver's "E". And that one is Weaver's "F".

24 JUDGE BAXTER: Okay.

25 MR. MERICLI: Which you already have. And Kreider

1 and Tiller and Allen are "G", "H" and "I".

2 JUDGE BAXTER: Those were part of discovery?

3 MR. MERICLI: These were all verified
4 interrogatories, with exhibits attached.

5 JUDGE BAXTER: Okay.

6 MR. MERICLI: So in effect, they all constitute
7 affidavits. If this were summary judgment, there's specific
8 law if they were --

9 JUDGE BAXTER: They would be truthful, but when we
10 get to court we need to have --

11 MR. MERICLI: Yes.

12 JUDGE BAXTER: You're not trying to put those in
13 instead of their testimony?

14 MR. MERICLI: No. In some instances I might.

15 JUDGE BAXTER: Okay.

16 MR. MERICLI: Because in addition to their
17 testimony, because of the federal rule of evidence that I have
18 information on -- And I can show you, if you'll excuse me.

19 JUDGE BAXTER: He has a right to cross-examine.
20 He can't --

21 MR. MERICLI: I'm bringing them all, with the
22 exception of Davison. So they're all there. As a practical
23 matter everybody is going to be available for
24 cross-examination.

25 JUDGE BAXTER: Instead of entering them he may

1 bring the evidence.

2 MR. MERICLI: He may use the affidavits to
3 cross-examine them.

4 MR. FLEMING: I believe I may make the most of the
5 discovery thing because he's not giving me what I need, and I
6 cannot do nothing if I don't have that.

7 MR. MERICLI: If we could postpone that until
8 we're done.

9 MR. FLEMING: No, there ain't no postponing, man.

10 MR. MERICLI: Not forever -- This is something I
11 drew up years ago.

12 JUDGE BAXTER: Okay.

13 MR. MERICLI: And it's on Rule 8038, and it talks
14 about essentially people with a duty to make investigative
15 reports, who investigate and do things, their reports are
16 admissible.

17 JUDGE BAXTER: If they're verified.

18 MR. MERICLI: For the truth of the matters
19 asserted, if they're verified and if it's not a criminal case.

20 JUDGE BAXTER: Okay.

21 MR. MERICLI: So in other words, in our kind of
22 cases there is actually a relaxation on hearsay for their
23 records. So I don't think it really amounts to a great deal,
24 because with the exception of a few people that haven't,
25 defendants like Jones, it's up to him anyway. All these

1 people are going to testify and their recollections are
2 largely bound by what they wrote down in the first place
3 anyway.

4 JUDGE BAXTER: It's actually better for the
5 plaintiff when he's examining because he already has what
6 they're saying and testifying to.

7 MR. MERICLI: Correct. What I'm saying is he
8 probably doesn't trust me and he probably shouldn't, but the
9 fact is, if he wants --

10 JUDGE BAXTER: I won't respond to that.

11 MR. MERICLI: I think he should.

12 JUDGE BAXTER: I understand.

13 MR. MERICLI: As a member of the bar, but I can't
14 --

15 JUDGE BAXTER: You can't make him.

16 MR. MERICLI: I can't make him, and I don't blame
17 him if he doesn't. And he's just lived a different life than
18 I have. The fact is, he may -- I don't see why he wouldn't
19 want these things to use for cross-examination.

20 JUDGE BAXTER: What he's offering to give you are
21 the affidavits that they have used as part of their
22 interrogatories, verifying their interrogatories and other
23 investigative tools. By having those itself is testimony of
24 these defendants, they've already given in front of you to
25 which they've sworn, you can use those when you examine,

1 cross-examine them for inconsistent statements or however you
2 wish to use them.

3 What he's saying is he's offering those to you if you
4 want to use those.

5 MR. FLEMING: I just want to show you this letter
6 you sent me where you said, all right, I was asking for a
7 second set, he sent me Weaver's second set of Albion. Then he
8 said, Allen, Kreider -- Yeah, Allen, Kreider and Wittel will
9 be on the way as soon as he get them back to him. And then I
10 asked him here today and he said he changed his mind, I'm not
11 accepting them.

12 JUDGE BAXTER: Because he only has to give you one
13 set and you were responsible to keep those.

14 MR. MERICLI: I told him two things. First to be
15 practical, as of last Thursday when I was in the office for
16 the last time as I came up here to Albion to try to get this
17 all straightened up, Wittel, Allen and Kreider hadn't given me
18 back their second set because they didn't even take it that
19 seriously, because they thought it was redundant of their
20 first set.

21 Secondly -- So, I don't even have them. Secondly,
22 they're going to be here now, so that's that. And thirdly,
23 they've already given a set of interrogatories, and Mr.
24 Fleming has not, in our private discussions, has not told me
25 this is just about that one little situation where he was

1 banging on the cell door and they gave him a misconduct, which
2 I've already said and argued he procedurally defaulted. Unlike
3 the Albion misconduct, the Camp Hill misconduct he
4 procedurally defaulted. He already answered interrogatories
5 on that.

6 I don't know what more there can be. We've turned in
7 all the misconduct, complete through the appeals process.
8 They've answered questions on it.

9 JUDGE BAXTER: And they're there for you --

10 MR. MERICLI: There's not much to it.

11 JUDGE BAXTER: If you hit a brick wall, and it's
12 because it's something you didn't know, that you didn't ask,
13 then we'll talk about that. Before you go on, do you need to
14 contact the people at --

15 MR. MERICLI: I told them three o'clock.

16 JUDGE BAXTER: Because if you want to tell them
17 come on up. Now since I, you know, I'll give you a few
18 minutes and we'll come back to that. I just thought about it.
19 We'll take a few minutes.

20 MR. MERICLI: And I also told him when we were
21 talking and I also said that I did write that in the letter.
22 He's right, I wrote that in the letter first. I haven't
23 gotten them back. But I told him I changed my mind, you don't
24 need them anyway because if you look at your letter of August
25 31st, you said discovery was closed except for the mailing of

1 tapes and verification of was there any other things --

2 JUDGE BAXTER: That's true.

3 MR. MERICLI: So I mean, I apologize to the extent
4 that I said that, but I don't really see it as a major -- As
5 any underhanded kind of thing that I've done to seriously
6 disturb his rights. After all, they've been interrogated and
7 sworn on these present points. JUDGE BAXTER: All
8 right.

9 MR. MERICLI: If you'll excuse me.

10 JUDGE BAXTER: We'll go off the record here.

11 (At which time, 2:05 p.m., a recess was taken
12 and proceedings resumed at 3:00 p.m.)

13 MR. FLEMING: We're making some progress here.

14 MR. MERICLI: What we understand is that in fact
15 it turned out to be more or less the case that the second set
16 of interrogatories requested by Mr. Fleming of Kreider, Wittel
17 and Allen from SCI Camp Hill are in fact supplemental of what
18 was already given to him, and that as a result, he's
19 satisfied.

20 There was a little bit of -- He was inquiring after
21 some extra detail about who was where and what. But basically
22 there isn't a lot of difference, so as a result he seems
23 satisfied and that issue is no longer here.

24 JUDGE BAXTER: Not on the table.

25 MR. MERICLI: The other thing is, we were talking

1 about what pieces of evidence we would want to put in, and I
2 told him -- and I think Frank was also -- Mr. Fogel was
3 thinking about this a little bit earlier, I would be happy to
4 move into evidence not only tapes "A" and "B", but the
5 affidavits.

6 JUDGE BAXTER: All of those things.

7 MR. MERICLI: Of the misconducts themselves, the
8 medical records themselves and everybody's interrogatories
9 that he's requested. And then they could be Exhibits "A"
10 through "I". And they would be fully -- If he's not --
11 doesn't have a problem with that, they could be worked that
12 way.

13 MR. FLEMING: I don't want to mix mine.

14 MR. MERICLI: But he also said -- and this is
15 where we left off -- he has a couple pieces of evidence that
16 are unique to his case and he showed me one of them.

17 JUDGE BAXTER: That's fine. He can use his unique
18 evidence and mark them himself, and we'll see if you have any
19 objections. But my concern right now is you can use any
20 exhibit he puts in, but do you have an objection to those
21 being placed into evidence?

22 MR. FLEMING: If he going to show me them, right?

23 JUDGE BAXTER: Yes, you have them. Actually,
24 you've already seen them all.

25 MR. FLEMING: Well, once I look over his and see

1 if they all the same, I don't got no objections.

2 MR. MERICLI: Sure.

3 JUDGE BAXTER: That's a good start.

4 MR. FLEMING: I have no objections.

5 JUDGE BAXTER: What do you have that's not part of
6 his stuff?

7 MR. FLEMING: You got that request?

8 MR. MERICLI: No, you have it.

9 MR. FLEMING: Do you have a copy of it?

10 MR. MERICLI: I don't have it.

11 MR. FLEMING: Do I got to give him a copy of it?

12 JUDGE BAXTER: Yes, you have to give me a copy and
13 you have to have one and show him.

14 MR. MERICLI: He showed it to me.

15 JUDGE BAXTER: Have you seen it? Do you have a
16 problem with that being placed into evidence?

17 MR. MERICLI: No.

18 JUDGE BAXTER: Do you want to see it now, see if
19 he's changed it?

20 MR. MERICLI: He hasn't changed it. This is a
21 document of inmates to staff that he wrote --

22 JUDGE BAXTER: You gave it to him as part of
23 discovery?

24 MR. FLEMING: No, I kept it.

25 MR. MERICLI: It's his originally. If you feel --

1 On the back it feels as if the pen point pressed on the back.

2 JUDGE BAXTER: That's not a copy?

3 MR. MERICLI: That happens to be the original. I
4 would like a photocopy if I could have one.

5 MR. FLEMING: Sure.

6 MR. MERICLI: The point is, as I understand it and
7 I'm not advocating it, but he's -- his point is that it shows
8 he notified the unit manager who had a supervisory
9 relationship to Kreider, Allen and Wittel of the fact that he
10 was a complaining witness in Colbert's assault.

11 JUDGE BAXTER: All right, can we stipulate to that
12 as well then to be placed in evidence?

13 MR. MERICLI: I think it's authentic. I don't
14 think it's been doctored or anything.

15 JUDGE BAXTER: We'll mark that as Plaintiff
16 Exhibit 1.

17 MR. FLEMING: Oh, number 1, because I had them
18 numbered already.

19 JUDGE BAXTER: That's fine.

20 MR. FLEMING: That's number 8.

21 JUDGE BAXTER: All right, we'll use stickers when
22 we get into the courtroom. All right, what else do you have?

23

24 MR. FLEMING: I got everything in order.

25 JUDGE BAXTER: We weren't -- Go back to the

1 beginning and let's see what you've got.

2 MR. MERICLI: Could I have a photocopy of Exhibit
3 8?

4 JUDGE BAXTER: Yes.

5 MR. FLEMING: Exhibit 1 I got the misconduct by
6 Captain Weaver for lying to staff.

7 MR. MERICLI: That's all part of Weaver's -- First
8 there are two things, that's part of Valerie Bloom's affidavit
9 as a records keeper as to the misconduct itself and his
10 initial response. And the whole thing is also duplicated in
11 Weaver's grand affidavit.

12 JUDGE BAXTER: The reason he's mentioning this is
13 you can use that document.

14 MR. FLEMING: For me?

15 JUDGE BAXTER: Exactly.

16 MR. FLEMING: I'm using it for me.

17 JUDGE BAXTER: But if it's already placed into
18 evidence with a number on it or letter for him, then you don't
19 have to make copies and you can use his, and you can show me
20 his and it's still considered as evidence. It doesn't matter
21 who it comes from it from, it's still evidence.

22 MR. FLEMING: It says the same thing? How am I
23 going to know?

24 JUDGE BAXTER: You can use it, but you don't have
25 to mark it separately because it's already in evidence.

1 MR. FLEMING: You're saying I don't got to put a
2 number on it?

3 JUDGE BAXTER: You don't have to because he's
4 willing to mark his first and he has copies.

5 MR. FLEMING: All right.

6 MR. MERICLI: I'm sure I have a copy.

7 JUDGE BAXTER: He has a copy.

8 MR. FLEMING: That's my first one.

9 JUDGE BAXTER: All of the stuff having to do with
10 the --

11 MR. MERICLI: The lying --

12 MR. FLEMING: That said I lied.

13 MR. MERICLI: The 5-20-02 misconduct.

14 JUDGE BAXTER: All right, the 5-20-02 misconduct.

15 MR. MERICLI: Written by Captain Weaver.

16 MR. FLEMING: I've got the two grievances that I
17 filed on the staff denied me medical treatment.

18 JUDGE BAXTER: What is the date?

19 MR. FLEMING: 5-15.

20 JUDGE BAXTER: That's the 5-14?

21 MR. FLEMING: Yeah, 5-14 incident, but I filed
22 them on --

23 JUDGE BAXTER: The next day.

24 MR. FLEMING: The other grievance I got, this is
25 it right here (indicating). This is the other one.

1 JUDGE BAXTER: All right.

2 MR. FLEMING: These are the two that I'm --

3 JUDGE BAXTER: All right, you don't have those
4 marked, Mr. Mericli?

5 MR. MERICLI: No.

6 JUDGE BAXTER: Okay.

7 MR. MERICLI: They're referred to in Weaver's
8 report.

9 JUDGE BAXTER: See the one he has there is a xerox
10 copy. Let Mr. Mericli see that to determine whether or not he
11 wants to object to this.

12 MR. MERICLI: I gave you that in answer to the
13 affidavits, right?

14 MR. FLEMING: No, that's it right there
15 (indicating).

16 MR. MERICLI: Captain Weaver's interrogatories.
17 Yeah, this is part of Weaver's -- part of Weaver's
18 interrogatories. I have it already.

19 JUDGE BAXTER: He's not objecting to anything.

20 CLERK: There were two of them?

21 MR. FLEMING: There were two of them.

22 MR. MERICLI: That's a request to staff. I don't
23 know if I saw that.

24 MR. FLEMING: That's the one --

25 JUDGE BAXTER: We're trying to forestall any

1 objections and slowing up trial tomorrow.

2 MR. FLEMING: All right.

3 MR. MERICLI: No objections.

4 JUDGE BAXTER: All right, keep going.

5 MR. FLEMING: I got medical --

6 JUDGE BAXTER: Let me say, Mr. Mericli, if he
7 wants to duplicate exhibits, I'm not going to argue with him.

8 MR. MERICLI: Okay.

9 JUDGE BAXTER: It may not be the smoothest way but
10 if that's how he's got it organized I don't want to mess him
11 up.

12 MR. FLEMING: I have these medical ones about what
13 I was claiming that happened to me.

14 JUDGE BAXTER: All right, show all that to Mr.
15 Mericli. These are all going to be part of one exhibit?

16 MR. FLEMING: Yeah.

17 JUDGE BAXTER: Exhibit 2?

18 MR. FLEMING: Yeah. That there on top signed and
19 dated.

20 JUDGE BAXTER: This is to show what?

21 MR. FLEMING: To show that they didn't never give
22 me any medical treatment.

23 JUDGE BAXTER: Remember we talked about that's not
24 a remaining claim.

25 MR. FLEMING: This is to show --

1 JUDGE BAXTER: You were injured greatly.

2 MR. FLEMING: I was injured greatly, that I'm not
3 just saying --

4 JUDGE BAXTER: That you weren't.

5 MR. MERICLI: I understand. I know about this.

6 JUDGE BAXTER: All right. That makes sense.

7 MR. FLEMING: All right, then I got --

8 JUDGE BAXTER: No objections on that. Excellent.

9 MR. MERICLI: Have we numbered these?

10 JUDGE BAXTER: I'm going to send them off to my
11 courtroom deputy when we're done and have them numbered. I
12 guess we will number them Exhibit 3-A, "B", "C", "D" if that's
13 how you want to do it.

14 MR. FLEMING: That's what it said on the order.

15 JUDGE BAXTER: All right.

16 MR. FLEMING: This one here (indicating) is
17 misconduct for destroying, altering or tampering or damaging
18 property.

19 MR. MERICLI: I have that. Again, that's one
20 that's in the Valerie Bloom and it's also --

21 (Off-the-record discussion.)

22 MR. MERICLI: I have it. That's the 8-2 one that
23 Maldonado and Davison wrote on you?

24 MR. FLEMING: Yes.

25 JUDGE BAXTER: All right. No objections?

1 MR. MERICLI: No objection.

2 MR. FLEMING: This is the one with the assault
3 when was going out in the yard, in the morning yard.

4 MR. MERICLI: Is that 8-23?

5 MR. FLEMING: 8-23, yeah.

6 MR. MERICLI: That's Maldonado and Davison. I
7 have that, too.

8 JUDGE BAXTER: Anything else?

9 MR. FLEMING: Yes.

10 JUDGE BAXTER: It's all the same stuff.

11 MR. FLEMING: I got a couple more. This is the
12 affidavit that I filed --

13 JUDGE BAXTER: You filed with the Court.

14 MR. FLEMING: These are the other defendants now.
15 These are Albion's (indicating), these are Camp Hill
16 (indicating).

17 JUDGE BAXTER: All right. Why don't you show that
18 --

19 MR. MERICLI: I've never seen that before, so if I
20 could have that -- This is the affidavit filed for Colbert.

21 MR. FLEMING: Also signed by me and Colbert at the
22 bottom.

23 MR. MERICLI: All right. I've never seen that
24 before.

25 JUDGE BAXTER: We'll make a copy of Exhibit 5.

1 MR. FLEMING: Si x (i ndi cati ng).

2 JUDGE BAXTER: Exhi bi t 6 and 8; i s that ri ght?

3 MR. MERICLI: That's correct.

4 MR. FLEMING: Then I got the refusing obeying
5 order mi sconduct.

6 MR. MERICLI: Is that from Camp Hill?

7 MR. FLEMING: Yeah.

8 MR. MERICLI: That's part of Allen's and --

9 JUDGE BAXTER: All ri ght, i t looks l i ke i t i s,
10 because that's the yellow.

11 MR. MERICLI: It's part of Allen's and Wittel's.

12 JUDGE BAXTER: Okay. The reason I don't want to
13 mess him up i s because I don't want to be accused of messi ng
14 up hi s order.

15 MR. MERICLI: That's fine.

16 MR. FLEMING: I ai n't going to treat you l i ke
17 that.

18 JUDGE BAXTER: That's number 8 we talked about?

19 MR. FLEMING: Yeah.

20 JUDGE BAXTER: We have to make a copy of 6 and 8.
21 Now what's 9?

22 MR. FLEMING: Thi s i s the poli cy, the DC-ADM-001
23 --

24 JUDGE BAXTER: What's the first page?

25 MR. FLEMING: That's notes that I wrote.

1 JUDGE BAXTER: You're not putting that --

2 MR. FLEMING: Not this here (indicating), just
3 that (indicating).

4 JUDGE BAXTER: The policy.

5 MR. FLEMING: The DC-ADM-001 abuse allegation

6 MR. MERICLI: No objection.

7 JUDGE BAXTER: No objection. No copies needed.
8 Excellent.

9 MR. FLEMING: That's it.

10 JUDGE BAXTER: Excellent. Give 6 and 8 to Frank
11 and we'll make copies and you can put them back into the slot
12 so we don't lose that.

13 MR. MERICLI: I can show you what I have, too.

14 JUDGE BAXTER: Okay.

15 MR. MERICLI: And we will see if we can get that
16 wrapped up.

17 JUDGE BAXTER: Excellent. That's going faster
18 than I expected.

19 MR. MERICLI: I believe I gave you a copy of the
20 Valerie Bloom affidavit.

21 MR. FLEMING: Yeah.

22 JUDGE BAXTER: Do you still have that?

23 MR. FLEMING: I don't need that.

24 JUDGE BAXTER: Let me find that before we move on.

25 MR. MERICLI: I can find it. I can get you

1 another one.

2 JUDGE BAXTER: This file is already a nightmare

3 MR. MERICLI: It has a blue sticker.

4 JUDGE BAXTER: This (indicating)?

5 MR. MERICLI: That's not it.

6 JUDGE BAXTER: Hold on.

7 MR. FLEMING: I sat it over there (indicating). I
8 sat it over there earlier. Remember, you gave it to me.

9 MR. MERICLI: Let me see if I have it.

10 JUDGE BAXTER: All right, we'll find it.

11 MR. FLEMING: Oh, I forgot these tapes, I'm going
12 to have to use them.

13 JUDGE BAXTER: You ended up on 9.

14 MR. FLEMING: Yeah.

15 JUDGE BAXTER: These will be 10 and 11 for you,
16 and "A" and "B" for him.

17 MR. MERICLI: I'm sorry, I had it all along.
18 Here's "C".

19 JUDGE BAXTER: Okay.

20 MR. MERICLI: All the misconducts from Albion. As
21 you know now --

22 JUDGE BAXTER: Yes.

23 MR. MERICLI: -- You have the actual copies, each
24 one of these things was appealed through final review.

25 JUDGE BAXTER: Okay. So you have total copies of

1 all of that now.

2 MR. MERICLI: That's correct.

3 JUDGE BAXTER: That would be "C"?

4 MR. MERICLI: "C".

5 JUDGE BAXTER: Do you see these? What he's
6 showing is all of the Albion up through final review, and
7 there are copies of what you have. All right.

8 MR. MERICLI: I don't have the final review
9 because you have it.

10 JUDGE BAXTER: I have it, that he gave me.

11 MR. MERICLI: And I would move these in along with
12 "A" and "B", this will be "C".

13 JUDGE BAXTER: He gave me that.

14 MR. MERICLI: They came on the FAX today. All
15 right.

16 MR. MERICLI: That's all been part of the record.

17 JUDGE BAXTER: You may want to put them with "C"
18 just for your own purposes. Okay, I'm missing the 10th page
19 that went through the FAX as numbered at the top. Anyone see
20 it anywhere? This will go with "C" (indicating).

21 MR. MERICLI: It was FAX'ed by my office.

22 JUDGE BAXTER: I'm looking at the numbers and I
23 have them from three. I don't actually have two either.
24 Frank, I'm looking at what was FAX'ed today, that he gave me
25 from the office, this comes in at one, so two is missing and

1 number 10. Let me look here. Look in your pile.

2 MR. FLEMING: We have final review in my stuff.

3 MR. MERICLI: We established that the --

4 JUDGE BAXTER: We established the one, but you're
5 not complaining?

6 MR. MERICLI: I'm not complaining. And the other
7 one you understand is a different situation which is Camp
8 Hill.

9 JUDGE BAXTER: Here's one (indicating), here's two
10 (indicating). All right "C" will be this, and when you get
11 this together.

12 MR. MERICLI: And "D" is Gail Kelly, these are the
13 medical records.

14 JUDGE BAXTER: And Mr. Fleming has seen them and
15 no problem.

16 Mr. Fleming, I want to show what you he's marking as
17 "D". Those are the medical records. Those are accurate?

18 MR. FLEMING: Yeah.

19 JUDGE BAXTER: So I know you won't object to
20 those.

21 MR. MERICLI: Those will be "A", "B", "C" and "D".

22 CLERK: Is there a cover page --

23 MR. MERICLI: There were two cover sheets.

24 There's one (indicating) and there was another one. There's
25 one from Cathy saying we could locate --

1 CLERK: These are the ones and these are sick call
2 requests and medical documents?

3 MR. MERICLI: That's "D".

4 (Off-the-record discussion.)

5 MR. MERICLI: There's actually nothing missing.
6 So "D" is the medical records from Gail Kelly.

7 JUDGE BAXTER: All right put that with "C". See
8 that, Mr. Fleming, he's putting that together. You know what
9 that is.

10 MR. MERICLI: It demonstrates --

11 JUDGE BAXTER: What was requested of us today

12 MR. MERICLI: Final review, the ones at Albion
13 only. This is the medical records that you saw before.

14 JUDGE BAXTER: "A", "B", "C" and "D". We're done.
15

16 MR. MERICLI: "E" is Captain Weaver's, which I
17 call a grand affidavit. It has everything in it, a lot of the
18 misconducts, Weaver's investigative report, Jones's --

19 JUDGE BAXTER: The interrogatories.

20 MR. MERICLI: There's a report from Jones, Eddy,
21 Sullivan, Tiller.

22 JUDGE BAXTER: This is your affidavit. Then the
23 things he answered in his interrogatories that you swore to.

24 MR. FLEMING: I got it. See, I'm cool. All my
25 stuff I got.

1 JUDGE BAXTER: You're okay with this, you're not
2 objecting?

3 MR. FLEMING: No, that's all cool, all right.

4 CLERK: I want you to understand when he's going to
5 refer to them in court, he's going to have them stapled
6 together. I know you have those documents, but would it be to
7 your advantage to have a copy so you could follow along with
8 them --

9 JUDGE BAXTER: Mr. Mericli will give him a copy
10 tomorrow in court.

11 MR. MERICLI: He doesn't want them.

12 JUDGE BAXTER: He doesn't want them?

13 MR. MERICLI: But I'll have everything here.

14 JUDGE BAXTER: Before Mrs. Wallen gets started on
15 marking your exhibits, do you see how, for instance, with "C"
16 he has connected them all together with a clip so we have all
17 these pages as "C". Shall we connect those with a clip so
18 that -- or do you want me to mark each one, C-1, C-2, C-3? We
19 could do that. It would be more work for Mrs. Wallen. Do
20 you want to make her happy or not?

21 MR. FLEMING: What? You going to connect these.

22 JUDGE BAXTER: Yours. You have multiple page
23 exhibits for one. Can we connect them with a clip and not
24 mark each page?

25 MR. FLEMING: Yeah.

1 JUDGE BAXTER: Let's do that.

2 MR. MERICLI: This is Weaver's verification
3 affidavit that says he couldn't find -- I gave you one of
4 these in the mail but you may want one again. This is where
5 he says he's checked, that these are the only tapes that
6 exist.

7 JUDGE BAXTER: It's his request?

8 MR. FLEMING: Yeah.

9 MR. MERICLI: Yes. And the other cameras don't
10 work in the library. And all those other things we discussed
11 in answer to interrogatories.

12 JUDGE BAXTER: Affidavits, okay. You'll probably
13 use this tomorrow I suspect?

14 MR. FLEMING: Yeah.

15 MR. MERICLI: All right, I'm down to the end here.

16 MR. FLEMING: When you get down to the two
17 grievances in there, there's medical records in there, you
18 could put like on the two grievances mark the number and then
19 put 1-A.

20 MR. MERICLI: Krieder's answers from the
21 affidavit, from the Camp Hill misconduct.

22 JUDGE BAXTER: I've got it.

23 MR. MERICLI: Exhibit "G".

24 JUDGE BAXTER: Your requests, his answers and then
25 he verifies it.

1 MR. MERICLI: Here's Allen's (indicating), which
2 is Exhibit "H". It's Allen's.

3 JUDGE BAXTER: Same type of stuff?

4 MR. MERICLI: Exactly the same in every way.

5 JUDGE BAXTER: All right. Mr. Allen exactly the
6 same.

7 MR. MERICLI: Then Wittel's is -- it's different
8 in the sense that it doesn't have anything attached, he just
9 cross references to the other two guys.

10 JUDGE BAXTER: His answers to the same questions.

11 MR. MERICLI: And no attachments.

12 JUDGE BAXTER: And no attachments. And he has --

13 MR. MERICLI: An affidavit.

14 JUDGE BAXTER: An affidavit and swears that's
15 true. Okay. Then the last thing here is -- That's it. Oh,
16 there's Mr. Tiller's from the Albion. That would be "J", and
17 he has his answers, he has his misconduct and his report about
18 the kicking which are also part of Weaver's as well.

19 MR. MERICLI: So that's Mr. Tiller's.

20 JUDGE BAXTER: All right.

21 MR. MERICLI: And along with Tiller's own answers
22 --

23 JUDGE BAXTER: The importance of this is there
24 hasn't been any depositions in this case, so these
25 interrogatories are the only basis he can use that to

1 cross-examine people. And that goes here, "J".

2 So here we have "A" through "J". You are allowed to
3 use those, because those are evidence to the Court. You are
4 allowed the use those. If you want to take one of those out,
5 you can say, didn't you say this.

6 MR. FLEMING: Whatever, I can't use on my
7 cross-examination. I can use the tape --

8 JUDGE BAXTER: You can. You can use anything that
9 he's using as evidence.

10 MR. MERICLI: I'd like to move these formally into
11 evidence, in the absence of an objection.

12 JUDGE BAXTER: There's no objection to any of
13 those?

14 MR. FLEMING: No.

15 JUDGE BAXTER: All right. Those are -- The motion
16 is granted and those will be moved into evidence. Why don't
17 you do the same, make a formal motion of Exhibits 1 through 11
18 be moved?

19 MR. FLEMING: All right, I'll motion that Exhibits
20 1 through 11 be moved into evidence.

21 MR. MERICLI: No objections.

22 JUDGE BAXTER: All right, Plaintiff's 1 through 11
23 will be admitted into evidence. Excellent. All right, thank
24 you. All right, if something comes up tomorrow and there's
25 something else you want to use, a document you found tonight

1 that you want to use it, doesn't mean it's foreclosed, but if
2 you could tell me about it before trial it would be a good
3 idea.

4 MR. MERICLI: There's a minor point I'd like to
5 clarify here.

6 JUDGE BAXTER: All right.

7 MR. MERICLI: That is I filed a set of proposed
8 stipulations in this case.

9 JUDGE BAXTER: I have those.

10 MR. MERICLI: There are some mistake that need to
11 be corrected.

12 JUDGE BAXTER: Did you get a copy of that, Mr.
13 Fleming? It was just last week.

14 MR. FLEMING: I thought I could come here and do
15 mine.

16 JUDGE BAXTER: Did you get a copy of this?

17 MR. FLEMING: I didn't get none of that. When did
18 you send that out?

19 JUDGE BAXTER: 10-13. You wouldn't have got it.

20 MR. MERICLI: No, it just says that this is the
21 first -- the corrections --

22 JUDGE BAXTER: I'm going to interrupt. There are
23 only three pages. We'll go off the record and why don't you
24 take a read.

25 (Off-the-record discussion.)

1 MR. MERICLI: They need to be corrected.

2 MR. FLEMING: Yeah, I agree with number one.

3 MR. MERICLI: Number one says that he filed a
4 civil rights complaint in federal court complaining about
5 prison conditions at Albion, and I agree it is a
6 Constitutionally protected activity.

7 JUDGE BAXTER: And I agree.

8 MR. FLEMING: Albion and Camp Hill, too.

9 MR. MERICLI: If you --

10 JUDGE BAXTER: Hold on.

11 MR. MERICLI: It's a Constitutionally protected
12 written activity.

13 JUDGE BAXTER: It is written in there, and I agree
14 it is --

15 MR. FLEMING: If Camp Hill on there, too, I agree.

16 MR. MERICLI: It doesn't matter technically, but
17 if we're talking about the retaliation claim, that it comes
18 from a time when there wasn't anything at Camp Hill -- See,
19 what I mean? I'm just trying to be technical. It doesn't
20 matter.

21 JUDGE BAXTER: He's talking about the retaliation
22 claim and that's only with Albion.

23 MR. FLEMING: Yeah, I filed it with them but I
24 filed it with Camp Hill.

25 JUDGE BAXTER: Not a retaliation claim.

1 MR. FLEMING: Yes, I did.

2 MR. MERICLI: It's a retaliatory misconduct claim
3 at Camp Hill.

4 MR. FLEMING: No.

5 MR. MERICLI: But what makes -- The thing that
6 makes it a retaliatory misconduct at Camp Hill is he filed a
7 complaint complaining about prison conditions at Albion.

8 JUDGE BAXTER: You say you will not stipulate to
9 this unless it says SCI Camp Hill also?

10 MR. FLEMING: Because I filed an affidavit, also.

11 MR. MERICLI: I'm just trying to be technical.
12 Point one of the retaliation test under Rausern -v- Horn, I
13 agree he was following a Constitutionally protected activity.
14 I've described it.

15 MR. FLEMING: If you put Camp Hill --

16 JUDGE BAXTER: Let me try to explain it to you.
17 In a retaliatory claim you have to prove three things. The
18 first one is that you had a Constitutionally protected
19 activity you were doing. He is agreeing to that element. You
20 don't have to prove that element. And the reason it says SCI
21 Albion is your complaint said that the retaliation that
22 happened to you in Camp Hill occurred because of what you
23 filed at SCI Albion.

24 That's what your claim says.

25 MR. FLEMING: Yeah, yeah, yeah, yeah.

1 JUDGE BAXTER: That's why only SCI Albion is
2 written in here. And if we write in SCI Camp Hill, that will
3 not take care of the first one because that's adding something
4 that's not in that count.

5 MR. FLEMING: He's saying I didn't make no First
6 Amendment claim at --

7 JUDGE BAXTER: No. What he's saying is your
8 retaliatory claim is that you were retaliated against at Camp
9 Hill for the Constitutionally protected activity you engaged
10 in at Albion.

11 MR. FLEMING: That's true.

12 JUDGE BAXTER: That's why it's written like that.
13 So this one sentence will take care of element one of your
14 retaliation claim.

15 MR. FLEMING: Yeah.

16 JUDGE BAXTER: Do you agree to that?

17 MR. FLEMING: Yeah.

18 MR. MERICLI: Number two is to take off the table
19 the second element of the retaliation claim. That says when a
20 corrections officer gave Mr. Fleming a misconduct that was
21 false, for the sole purpose of retaliating against him for
22 having filed a civil rights suit. Which, of course, I do not
23 admit they did, but the allegation is in fact adequate if
24 proven to support the second prong.

25 JUDGE BAXTER: That's the second prong. He's

1 saying that an act of a corrections officer in giving an
2 inmate a false misconduct is an adverse action. That's the
3 second thing you have to prove in the sense it would deter a
4 person from pursuing a Constitutionally protected activity.
5 That's the second thing you have to prove and he's stipulating
6 that's correct and you should, too.

7 MR. FLEMING: Yeah.

8 JUDGE BAXTER: All right. It's the third prong
9 that he will not agree to that you will have to prove
10 tomorrow, and that third prong is --

11 MR. MERICLI: I have here he was charged and
12 convicted of prison misconduct. In each instance, detailed in
13 the report recommendation, that in fact he was in fact
14 convicted in each instance. Not whether or not they were
15 true, but in fact he was convicted.

16 JUDGE BAXTER: All right.

17 MR. MERICLI: The problem now is they're twofold.
18 At subsection (b) it should say both Sergeant Tiller and
19 Corrections Officer Sullivan. That was a mistake, a
20 typographical error, that he's lying about Tiller kicked him
21 --

22 JUDGE BAXTER: Officer who?

23 MR. MERICLI: Sullivan.

24 JUDGE BAXTER: And Correction Officer Sullivan,
25 okay.

1 MR. MERICLI: The other problem is "C" and "E" do
2 not refer to named defendants, which I did not know at the
3 time I did the stipulation.

4 MR. FLEMING: Who are they?

5 MR. MERICLI: Well "E" was Sergeant -- "C" was
6 Sergeant Yurco and "E" was a guy named Mr. Vroman. And
7 they're both gone.

8 JUDGE BAXTER: They're both gone.

9 MR. FLEMING: Yeah.

10 MR. MERICLI: "C" and "E" are out of the picture.

11 MR. FLEMING: What's the one you just --

12 JUDGE BAXTER: Vroman.

13 MR. MERICLI: Yurco.

14 MR. FLEMING: The third one.

15 JUDGE BAXTER: I have to fix this.

16 MR. FLEMING: All right.

17 JUDGE BAXTER: So when you read it, you decide if
18 you agree to it when he's done, so "C" and "D" --

19 MR. MERICLI: We now know that number four is
20 wrong, that in fact -- Well, no, he has -- Number four is
21 correct. He has never succeeded in getting any of these
22 misconducts reversed through the administrative appeal system.

23 JUDGE BAXTER: Let's look at three first. Okay,
24 what he's saying, Mr. Fleming was charged with prison
25 misconduct. In each instance detailed in the report the

1 recommendation regarding defendant's motion to dismiss and
2 those are "A", 5-19 --

3 CLERK: Isn't that 14?

4 MR. MERICLI: Yes.

5 JUDGE BAXTER: All right. All right, that's
6 5-14-02, threatening an employee with bodily harm, using
7 abusive, obscene or inappropriate language to an employee,
8 refusing to obey an order. This was at SCI Albion. "B",
9 5-20-02, lying to an employee, false grievance that Sergeant
10 Tiller and Corrections Officer Sullivan -- that should be,
11 have assaulted him twice. I can't read that --

12 MR. FLEMING: Escorting --

13 JUDGE BAXTER: Escorting to the law library at SCI
14 Albion. This one is 8-2-02, destroying -- damaging state
15 property, SCI Albion.

16 MR. MERICLI: That's Davison and Maldonado and the
17 handcuff key.

18 JUDGE BAXTER: So, 8-23-02, assault, refusing to
19 obey an order, kicking the gate shut on CO Davison's hand.
20 And that was SCI Albion. And 8-11-03, refusing to obey an
21 order, using abusive language to employee, SCI Camp Hill.
22 He's asking to stipulate that those things were misconducts
23 that you were charged with.

24 MR. FLEMING: But I can't stipulate on them
25 because my defense was saying these misconducts are in

1 retaliation.

2 MR. MERICLI: Well, if you didn't get them and you
3 weren't convicted of them, then you definitely are out of
4 court. Then there weren't any adverse consequences.

5 JUDGE BAXTER: Here's what you're stipulating to,
6 you were charged and convicted -- You're not agreeing they
7 were right, but you were charged and convicted of these
8 things.

9 MR. MERICLI: That's the basis of your complaint.

10 MR. FLEMING: Yeah, stipulation.

11 JUDGE BAXTER: So we don't have to go through all
12 that in court. The next one --

13 MR. MERICLI: Simply they've never been reversed
14 on appeal.

15 JUDGE BAXTER: In other words, you have never been
16 successful in getting any of these misconducts reversed
17 through the administrative appeal system, through the
18 Pennsylvania Department of Corrections.

19 MR. FLEMING: No.

20 JUDGE BAXTER: So you agree to that sentence?

21 MR. FLEMING: Yeah, I stipulate.

22 JUDGE BAXTER: Next one, any change in five?

23 MR. MERICLI: I just say there's no medical proof
24 that Mr. Fleming was physically injured on May 15th, 2002 when
25 Sergeant Tiller kicked him in his right ankle. And this

1 should say CO Sullivan slammed his right wrist in a cell door
2 slot on August 23, 2002. And when he says CO Davison shut a
3 gate on his right elbow.

4 JUDGE BAXTER: All right. Where is CO Sullivan
5 going?

6 MR. MERICLI: He goes in after and before slammed
7 --

8 JUDGE BAXTER: Okay.

9 MR. MERICLI: I'm simply saying there's no medical
10 proof to support your claim were you injured.

11 JUDGE BAXTER: Do you have any medical proof?

12 MR. FLEMING: I got them tapes. I'm not going to
13 stipulate.

14 JUDGE BAXTER: You have tapes?

15 MR. FLEMING: I have tapes.

16 JUDGE BAXTER: And you're going to have testimony.
17 But he's saying any medical records. Do you want to put
18 medical records --

19 MR. FLEMING: I got medical records.

20 JUDGE BAXTER: So you refuse to stipulate to
21 number five?

22 MR. FLEMING: I'm not going to stipulate to that,
23 I got medical records. Now --

24 MR. MERICLI: Six is a piece of law. I don't
25 really want to make an issue out of it if the Court doesn't --

1 It's a matter for the report.

2 JUDGE BAXTER: Mr. Fleming cannot --

3 MR. FLEMING: No.

4 JUDGE BAXTER: I have to offer it to you. You
5 disagree?

6 MR. FLEMING: Another thing about the questions
7 before that, right --

8 JUDGE BAXTER: Go ahead. I took it out.

9 MR. FLEMING: See, that's my whole issue right
10 there. But you probably say it ain't got nothing to do with
11 it. They never gave me medical treatment. That's my whole
12 argument.

13 JUDGE BAXTER: That you would have medical proof
14 if they gave you the treatment?

15 MR. FLEMING: Right.

16 JUDGE BAXTER: That's a good point.

17 MR. MERICLI: That's fine. Six is a matter of
18 law.

19 JUDGE BAXTER: So we'll --

20 MR. MERICLI: You can decide, your Honor, what you
21 think is correct.

22 JUDGE BAXTER: If the facts go in his favor, all
23 right.

24 MR. MERICLI: The other one is the factual and
25 legal issues in dispute, and that really isn't -- that was my

1 statement. There are a few -- One and two are what we argued
2 about this morning, the legal issues, and the factual issues I
3 think are all very cleanly stated. With the exception that
4 number two should say Sullivan instead of Tiller.

5 JUDGE BAXTER: Where is this?

6 MR. MERICLI: Page two, Roman numeral two. It
7 should say Sullivan.

8 MR. FLEMING: Can I have one?

9 MR. MERICLI: Sure.

10 JUDGE BAXTER: Hold on. Let me take a look.
11 Actually, I want you to have a copy. Where is it instead of
12 Tiller it should say --

13 MR. MERICLI: Sullivan.

14 JUDGE BAXTER: All right. I'd like to make a copy
15 of this, Frank.

16 MR. FLEMING: So what is --

17 JUDGE BAXTER: I'll explain this to you in one
18 second. I'll get you a copy. We're going to go through this.
19 If you all agree on this, then it will keep you focused
20 tomorrow. This is what you have to prove.

21 MR. MERICLI: I tried to write it cleanly.

22 JUDGE BAXTER: I told you you have two claims.
23 One is retaliation. Retaliation has three parts. The first
24 two parts you stipulated to. So all you have to prove is the
25 third part. And you can look at that in this document. And

1 that is that there's no connection --

2 MR. FLEMING: Casual --

3 JUDGE BAXTER: Causal connection between the --

4 MR. FLEMING: Yes, all right.

5 JUDGE BAXTER: So you stipulated to the first two.

6 MR. MERICLI: Yeah.

7 MR. FLEMING: We agree on that. All I got to do
8 is the third one.

9 JUDGE BAXTER: That's right.

10 MR. MERICLI: I also have another, if I may, with
11 your Honor's permission?

12 JUDGE BAXTER: All right.

13 MR. MERICLI: If you make out a basic case of
14 retaliation, then the burden shifts to me and I have an
15 opportunity to prove that regardless of whether or not they
16 had a retaliatory attitude towards you or any personal dislike
17 or malice toward you, because of what you did you still would
18 have gotten the misconduct, and that's my burden and I have to
19 prove that.

20 JUDGE BAXTER: That comes afterwards.

21 MR. MERICLI: That's my escape hatch.

22 JUDGE BAXTER: If you a causal connection between
23 the retaliation and --

24 MR. FLEMING: The adverse action.

25 JUDGE BAXTER: Yes, the adverse action like it was

1 the next day, whatever, then it turns to him. And if he
2 proves that he would have given you the misconduct anyway
3 because it was -- I don't know, for any reason. Because it
4 was conduct they always file people for, then --

5 MR. FLEMING: I can definitely do that.

6 JUDGE BAXTER: All right, let's
7 take a look at these. The first claim, he's starting out with
8 excessive force. This is what the excessive force law tells
9 us.

10 MR. FLEMING: I got it. You sent me one of them.

11 MR. MERICLI: The first two issues are the exact
12 issues we talked about this morning, and they were in the Rule
13 50 brief.

14 JUDGE BAXTER: I didn't rule on either of those
15 because of the timing.

16 MR. FLEMING: What's the date on that?

17 MR. MERICLI: It just came on the 12th.

18 JUDGE BAXTER: Just look at the legal issues here.

19 MR. FLEMING: All right.

20 JUDGE BAXTER: Now, this is written in the form of
21 a defendant. So, for you the issue would sound a little
22 different. How you're going to ask it in your own mind is,
23 have I shown sufficient facts to say I was kicked in one of my
24 ankles by a guard and that another guard --

25 MR. MERICLI: The same has to be --

1 JUDGE BAXTER: -- That another guard shut a cell
2 door slot on one of my wrists, in two separate instances on
3 the same day. And another day, another guard hit my elbow
4 with the yard gate. But he does not allege -- And that I was
5 injured.

6 So you have to put on evidence to show me that you were
7 in fact kicked in the ankle, that you were in fact -- your
8 wrist was in fact slammed by a cell door slot, and you were
9 hit in the elbow with a yard gate, and you suffered injuries.

10 MR. FLEMING: I can do this through the
11 procedures.

12 JUDGE BAXTER: This is what you have to show me.

13 MR. FLEMING: Through the proceedings.

14 JUDGE BAXTER: I want to you understand what you
15 have to show me, so if you keep that in mind as you go through
16 your case, you can keep focus where we're going. You have to
17 show me those three things.

18 You're charging that you were kicked in the ankle, one
19 ankle, you had one of your wrists slammed in the cell door
20 slot, and were you hit in the elbow with the yard gate. You
21 have to put evidence forward that they happened. You can't
22 just tell me, you have to put evidence forward.

23 If that means your testimony, the videotape, whatever
24 you use, all right?

25 MR. FLEMING: What was the third one?

1 JUDGE BAXTER: The elbow with the yard gate. See
2 it?

3 MR. FLEMING: Kicked in the ankle, had the door
4 shut on my wrist and hit in the elbow. So these are the three
5 I have to show.

6 MR. FLEMING: Then you have to show injury, that
7 you were really hurt.

8 MR. FLEMING: Let me -- That's the part --

9 JUDGE BAXTER: That's the tough part.

10 MR. FLEMING: What if I can show I was never
11 treated for my injury, would be to show anything. See, it's
12 hard for me to show injury when I can show that I was never
13 given --

14 JUDGE BAXTER: In some of these cases you have the
15 tape, and in some you do not. And you have your testimony,
16 and you can ask questions of other witnesses, what did my
17 wrist look like? Those sorts of things, you understand?

18 MR. FLEMING: All right.

19 JUDGE BAXTER: That's the way you get that
20 evidence in, if you don't have a medical -- You can make the
21 argument to me. I understand the argument you're making, I
22 would produce evidence if someone would have seen me --

23 MR. FLEMING: Yeah.

24 JUDGE BAXTER: I understand.

25 MR. FLEMING: So that's the third one?

1 JUDGE BAXTER: You can make that argument, but it
2 doesn't produce the evidence you need.

3 MR. FLEMING: Is that the third prong or just the
4 legal --

5 JUDGE BAXTER: Those are the things you have to
6 show for excessive force.

7 MR. FLEMING: All right.

8 JUDGE BAXTER: In other words, if there's
9 excessive force and you're not hurt, it's not a case.

10 MR. FLEMING: All right. Like I said --

11 JUDGE BAXTER: If you're hurt but it wasn't
12 excessive force, it's not a case. You have to show force and
13 you have to show injury.

14 MR. FLEMING: All right. Like I said, I can show
15 the force but -- And I can show that they -- I never -- They
16 never even checked me out to see if I had a injury.

17 JUDGE BAXTER: But you're claiming you had an
18 injury, so you have to bring me something. Even if it's your
19 testimony.

20 MR. FLEMING: I can bring something to the table
21 that I was injured and I can show. But like I said, I can
22 establish they never treated me for my claims.

23 JUDGE BAXTER: You have to understand this is a
24 Constitutional violation, Mr. Fleming. Like this with your
25 hand and the guy did it, and you come in here with a

1 Constitutional violation, I'm going to come in here and say,
2 hello, that's going to happen to you all the time, you're not
3 going to get money from the government from that guy doing
4 that, even if he was mad when he did it. You understand?

5 MR. FLEMING: Yeah.

6 JUDGE BAXTER: The reason the law is there is to
7 make sure they're not beating your butt in their custody. You
8 understand what I'm saying?

9 MR. FLEMING: So I can pull them tapes up and
10 everything?

11 JUDGE BAXTER: You can use whatever evidence you
12 want.

13 MR. FLEMING: All right.

14 MR. MERICLI: The second issue is simply what we
15 argued about this morning, that is what is the meaning of
16 Carter versus McGrady, that's just a legal issue.

17 JUDGE BAXTER: His argument is that because you
18 did not get any of your misconducts reversed, that as a matter
19 of law his defendants are not guilty of retaliation because
20 they would have charged you anyway, whether it was retaliatory
21 or not. You have to prove the causal connection that I told
22 you about, okay?

23 MR. FLEMING: All right.

24 JUDGE BAXTER: These are facts, that's the law,
25 these are questions I have to decide. I'm wearing two hats in

1 my position as the Judge as to the law. Now, as my factfinder
2 hat, which is often in the jury's hands, but it will be in my
3 hands, he's saying these are the questions I have to
4 determine.

5 MR. MERICLI: I'm paraphrasing them.

6 JUDGE BAXTER: All right.

7 MR. MERICLI: Did Tiller kick Mr. Fleming in the
8 ankle or did Mr. Fleming fake a stumble to cause the issue to
9 happen?

10 JUDGE BAXTER: So I have to decide who is right.

11 MR. MERICLI: And did Mr. Fleming tell the truth
12 or did he lie about Sullivan having shut his wrist in the cell
13 door slot?

14 JUDGE BAXTER: I have to make that determination.

15 MR. MERICLI: The other is, did any of the
16 defendants know that Mr. Fleming had filed a civil rights
17 action before each of them charged him with misconduct?

18 JUDGE BAXTER: He's saying if that's the case,
19 they didn't even know you filed a civil rights action, how are
20 they going to retaliate against you? He's arguing they didn't
21 know, and I will have to determine whether or not they knew.

22 MR. MERICLI: Were any of the misconducts false,
23 were they fake or framed?

24 JUDGE BAXTER: You've alleged they were frivolous
25 and harassing you.

1 MR. MERICLI: The last one is that Davison hit Mr.
2 Fleming's elbow with the yard gate or did Mr. Fleming,
3 actually try to slam --

4 MR. FLEMING: Try or did I do it? JUDGE

5 BAXTER: Try.

6 MR. MERICLI: I'm saying it's one way or the
7 other.

8 JUDGE BAXTER: And you're saying Davison hit you.
9 I have to decide that at the end of the case.

10 MR. FLEMING: Okay.

11 JUDGE BAXTER: I'm trying to see if there's
12 anything else. I think it's down to those. Now, this is just
13 a good road map for you tomorrow as you're going through the
14 evidence and presenting you're case. Take a look at the
15 factual things. Did I forget to say something about the
16 elbow?

17 Do you see where this will be helpful? Sometimes in
18 the midst of things you forget to bring some stuff up. I
19 forgot to talk about my wrist. Better bring that up. Because
20 if you don't bring it up, it's gone. Do you understand?

21 MR. FLEMING: Uh-huh.

22 JUDGE BAXTER: Okay. We have explained the
23 elements of the case. We have explained the trial process.
24 I've told you no interruptions. I can see you have a tendency
25 to go, no, huh-uh. Unless you're making an objection, you

1 have to wait for your turn and say his presentation was wrong.

2 MR. FLEMING: All right.

3 JUDGE BAXTER: Now, I've talked about the burden.

4 And sometimes we use that all the time in legalese, so I want
5 to say that again to you. It's your case, so you have to
6 prove it. I write that in my R and R sometimes. Okay, it's
7 good enough to go forward on a motion to dismiss, but it's a
8 far cry from your proving it. So it's your burden to prove
9 it.

10 When you're done with your case, Mr. Mericli can come
11 to me and say under 52(c), he didn't prove his case, no use
12 for me to say anything, you should dismiss it now. Judgment
13 is a matter of law to me. He may do that. So he has a right
14 to do that because it's your case and you have to prove it.

15 You can't expect him to give you any help on that. Do
16 you understand what I'm saying?

17 MR. FLEMING: Yes.

18 JUDGE BAXTER: All right. I've talked to you
19 about the kind of evidence, and we've already agreed to it.
20 So if there's anything new that you thought of or that you
21 want to bring in tomorrow, tell me about it before trial
22 starts. If there's something when you're looking through your
23 papers, something else you want to bring in, tell me before we
24 start. So we're in a good situation with everything here that
25 it's all numbered.

1 There are a lot of ways to make objections and a lot of
2 reasons to make objections on testimony that's coming in.
3 That's irrelevant, objection, you've asked and answered that
4 five times, you're harassing the witness. Those are all in
5 the Federal Rules of Evidence and you can look at them and get
6 comfortable with them.

7 There's one that is more difficult of a concept than
8 others and that's the hearsay rule.

9 MR. FLEMING: Okay.

10 JUDGE BAXTER: Documentary-wise we're okay. We
11 have everything under control. Mr. Mericli is not going to
12 say any document is hearsay because he's agreed to all these
13 documents we have here.

14 Testimony is not that way. So, hearsay evidence is
15 evidence that is not from you, that has been heard, and so he
16 can't cross-examine the person who said it and you're telling
17 him about it. That's why that's not allowed in, all right?

18 MR. FLEMING: All right.

19 JUDGE BAXTER: So if you hear that objection, do
20 you understand what that's about?

21 MR. FLEMING: Yeah.

22 JUDGE BAXTER: The reason it's not right is
23 because if you say one of the people who is not a defendant, a
24 CO who is not a defendant, the CO told me that he saw that guy
25 kicking me in the ankle, he's going to jump up right away and

1 say you can't consider that Judge Baxter because I can't
2 cross-examine that CO because he didn't call him as a witness.

3 That's hearsay evidence. That's why that is not
4 allowed. Did I explain that well enough?

5 MR. MERICLI: Perfectly fine, your Honor.

6 JUDGE BAXTER: Similarly, if one of his witnesses
7 says not only do I say that but, you know, what he told me,
8 that blah, blah, blah, blah, blah, or that inmate told me that
9 Fleming was making that stuff up. If he testifies -- That's a
10 hearsay objection.

11 MR. FLEMING: If he's there. If he ain't there
12 and he say somebody like you --

13 JUDGE BAXTER: Inmate so and so told me he was
14 full of hot air and he told me that at lunch. That's the sort
15 of thing you would object to as hearsay.

16 MR. FLEMING: All right.

17 MR. FLEMING: Because he's trying to prove to me
18 there's proof in what he's saying, even though it came from
19 someone else. Truth of the matter asserted is what we call
20 it.

21 Let me go through the check list. I will attempt not
22 to question plaintiff on the stand. If I see you going motor
23 mouth for two hours, you bet you I'm coming in here and I'm
24 going to say, let's focus here. If you ask the same question
25 over and over again and you've already gotten an answer, I'm

1 going to tighten it up. I don't want to be here five days and
2 neither do you.

3 MR. FLEMING: No.

4 JUDGE BAXTER: Keep it tight.

5 MR. MERICLI: Very good, your Honor.

6 JUDGE BAXTER: It's bad enough when attorneys do
7 that. When you don't have an attorney, you tend to do that,
8 too, because you want to make sure you get everything in. And
9 I will try to keep it tight, but I will try not to ask
10 questions, because when the Court does, it makes it difficult,
11 difficult for the either side. Because you can't object -- I
12 mean you can, but typically you don't like to. My questions
13 can cause you some pain so I'll try not to do that.

14 Do you understand the process, what we're going to do
15 tomorrow? You'll start off --

16 MR. FLEMING: Opening statement.

17 JUDGE BAXTER: Yes, you'll start off the case.
18 You'll say here's what I'm going to prove and make an argument
19 to me. Just make it short because it's not a jury, it's just
20 me. Make a quick statement. I know what it is, we just
21 talked about it.

22 MR. FLEMING: All right.

23 JUDGE BAXTER: If you want to make one, I'll let
24 you, but I'd rather get into it --

25 MR. FLEMING: I don't have to make an opening?

1 JUDGE BAXTER: You don't have to. Because a jury
2 doesn't have a clue what the case is about, so you have to
3 tell them. And I'm going to show you this and this. I know
4 what the case is about. I've been reading about it for two
5 years, all right. If you don't want to, you don't have to,
6 but I won't stop you.

7 MR. FLEMING: It won't effect me?

8 JUDGE BAXTER: It will not effect you at all. How
9 you put in your evidence and what you prove to me is what will
10 effect your case.

11 MR. FLEMING: I will just go straight to my
12 evidence then.

13 JUDGE BAXTER: Then you can either start by
14 calling any of the witnesses that he has or by putting
15 yourself on the stand and you're making your own testimony.

16 MR. FLEMING: I'll do that.

17 JUDGE BAXTER: While you do that, don't
18 forget that you can use any of the exhibits that are in
19 evidence. They're -- They've already been stipulated to, so
20 you don't have to spend your time getting them put into
21 evidence. You can just use them any time you want.

22 But even with your testimony, when you're on the stand
23 giving your testimony, you're subject to cross-examination.
24 So when you're done with any of the witnesses, it will be his
25 turn. And you can come back and clean things up as you wish.

1 He may decide, I'd like to ask a couple more. We'll go back
2 and forth until I stop him.

3 MR. FLEMING: All right.

4 JUDGE BAXTER: Then I say that's enough,
5 basically. You have to answer all questions that are asked of
6 you unless they've been objected to and sustained. Sustained
7 is you win the objection. Overruled is you didn't.

8 Am I missing anything?

9 MR. MERICLI: No, your Honor.

10 CLERK: I don't think so. You already said
11 hearsay, but that applies to written documents.

12 JUDGE BAXTER: But we have everything placed into
13 evidence, so I don't think we have a hearsay problem.

14 MR. FLEMING: So what about the closing arguments
15 and all that?

16 JUDGE BAXTER: Then when you're done, he will
17 either make a motion or not make a motion that says we don't
18 need to go to my part of the case because he's not proven it.

19 MR. FLEMING: Right.

20 JUDGE BAXTER: If he makes that motion, we'll have
21 an oral argument then. But you'll have to argue for your case
22 at that point. He'll make an argument saying he didn't prove
23 it. You come back and say I did. I'll make at that ruling.

24 If I rule that you've made enough case for the defense
25 to go on, we'll go through the same process with him calling

1 his witnesses. And at the end of that, you give closing
2 argument, here's what the testimony showed to prove my case et
3 cetera. All right?

4 MR. FLEMING: All right.

5 JUDGE BAXTER: You don't to have give a huge
6 closing argument because it's the Judge, the Judge knows where
7 you're going and what you were trying to prove, and probably
8 by then has made some sort of determination of whether or not
9 you've proved it.

10 MR. FLEMING: All right.

11 JUDGE BAXTER: I don't know how far to go on
12 damages.

13 MR. MERICLI: The law in Pennsylvania in the Third
14 Circuit is that he is not obliged to ask for nominal damages.
15 So, otherwise I think that --

16 JUDGE BAXTER: It would just be -- He doesn't even
17 have to bring it up.

18 MR. MERICLI: As far as compensatory damages, you
19 know I believe there's a lot of legal arguments under the PLRA
20 that would apply in terms of compensatory damages and physical
21 injury, and I would prefer to discuss that after the evidence
22 is in. And I don't --

23 JUDGE BAXTER: That's what I was trying to decide,
24 whether we should talk about that sort of stuff
25 now or --

1 MR. MERICLI: I believe he has to -- I believe you
2 can have -- I know, as a matter of fact, having had such a
3 matter happen to me in front of Judge Schwab that you can in
4 fact get punitive damages in a PLRA case in the absence of
5 compensatory damages.

6 JUDGE BAXTER: What I'm trying to decide is how
7 much should he put on in his case in chief or should we have
8 him bifurcate it depending on what your case in chief --

9 MR. MERICLI: I think --

10 JUDGE BAXTER: You're going to have to put on as
11 much evidence as you can for your injury. That goes to
12 damages. If you prove your case, I will decide whether or not
13 you get any money based on what you've shown me.
14 Compensatory-wise it's a matter of how much were you hurt and
15 how much you deserve to be paid for those injuries. Punitive
16 damages that he admits can happen, even if you've shown me
17 that you've been injured enough to show compensatory damages,
18 if you show these folks were malicious and, you know, just
19 were out to get you, enough that I decide they should be
20 punitively charged with charges, I can apparently do that as
21 well is what he's telling me. MR. FLEMING: All
22 right.

23 MR. MERICLI: Although my position is in light --

24 JUDGE BAXTER: He doesn't agree with that.

25 MR. MERICLI: And in Thomas versus Ferguson my

1 argument is, at his best, the situation will not arise to the
2 level of punitive damages. The Court may of course disagree.

3 JUDGE BAXTER: I understand.

4 MR. MERICLI: But it's important, too, that
5 whether he's relying on nominal damages and whether he's
6 entitled to consideration of punitive damages, if the evidence
7 in the law support punitive damages, whether or not he has
8 compensatory --

9 JUDGE BAXTER: His argument is under these facts
10 it doesn't matter because he's arguing you had a de minimus
11 injury, and because a de minimus could not have occurred with
12 such reckless disregard, and all those things we want to hear
13 about, if it's punitive. See what he's saying? MR.

14 FLEMING: Okay.

15 JUDGE BAXTER: His argument is that couldn't
16 happen in this case. But that's his argument and you can make
17 another.

18 MR. FLEMING: Would that punitive also be found,
19 the injured in deliberate indifference case? JUDGE

20 BAXTER: But we don't have any deliberate indifference case.

21 MR. FLEMING: Okay.

22 JUDGE BAXTER: You cannot use evidence in your
23 case that you allege they didn't take care of your medical
24 injuries fast, sufficient or at all, because that count has
25 been dismissed.

1 So what you have to show is that their actions were so
2 hateful or such -- with such an intent that -- to harm you.

3 MR. FLEMING: All right.

4 JUDGE BAXTER: See what I'm saying? That I would
5 say I'm going to punish these guys by making them pay a lot of
6 money.

7 MR. FLEMING: I can show a malicious intent then?

8 JUDGE BAXTER: Yes, it has to be a strong -- And
9 his argument is you'll never be able to show that because your
10 injuries were so slight, if at all. I mean I'm sure he's
11 going to say you weren't even injured.

12 I think we're ready to go. Not a minute too soon. Do
13 we have a time starting for tomorrow?

14 MR. MERICLI: 9:30 I thought.

15 MR. FLEMING: 9:30.

16 JUDGE BAXTER: All right, we'll start at 9:30 in
17 the courtroom. You're the plaintiff, so you sit -- Facing me
18 in the courtroom, you'll sit on the left side.

19 MR. FLEMING: All the way over there (indicating)?

20 JUDGE BAXTER: You sit closest to the jury box.

21 MR. FLEMING: All right.

22 JUDGE BAXTER: Okay, I think we have the T.V. up
23 and running. Proposed stipulations, I want those with me.
24 She's making a list of all your documents. All right, thank
25 you.

1 MR. MERICLI: Thank you, your Honor.

2 MR. FLEMING: Thank you.

3 (At which time, 4:05 p.m., the proceedings
4 were concluded.)

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C E R T I F I C A T I O N

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20 I, Denice A. Grill, RMR, a Court Reporter and
21 Notary Public in and for the Commonwealth of Pennsylvania, do
22 hereby certify that the foregoing is a true and accurate
23 transcript of my stenographic notes in the above-captioned
24 matter.

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Denice A. Grill, RMR
Registered Merit Reporter

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DATED: _____

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